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No. 80-1929

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BALTIMORE AND OHIO RAILROAD COMPANY AND THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Companies, faced with an "overriding business necessity" to reduce their work force and a lack of feasible alternatives, violated section 4(a) of the Age Discrimination in Employment Act ("ADEA") when they: (a) retired certain employees entitled to a full pension before normal retirement age; and (b) lowered the mandatory retirement age, in an effort "to reduce the [economic] impact upon employees who were let go"?

2. Whether the Companies failed to "observe the terms" of their pension plans within the meaning of the section 4(f)(2) ADEA exemption in retiring employees prior to normal retirement age, where the Companies: (a) "always had the power," as the district court found, "to involuntarily retire their employees under the consistent application of their plans," despite ambiguous plan language on the issue; and (b) had based their retirement decisions on the retirees' entitlement to full pension benefits under the plans and actually had paid them such benefits?

3. Whether the Companies' post-ADEA lowering of the mandatory retirement age constituted "a subterfuge designed to evade the purposes of [the ADEA]" so as to render section 4(f)(2) inapplicable, despite the business justifications for such action as part of a broader work force reduction, the pension plans' pre-ADEA existence and operation, and the substantiality of benefits paid thereunder?

4. Whether the court of appeals erred in reversing the district court's finding that the Companies had relied in good faith upon, and acted in conformity with, official Department of Labor interpretations of the ADEA, and thus had established a "good faith reliance" defense under section 7(e) of the ADEA?

5. Whether the court of appeals violated Rule 52(a), Fed. R. Civ. P., when it failed to credit crucial factual findings of the district court without holding such findings clearly erroneous?

PARTIES TO THE PROCEEDING

Baltimore and Ohio Railroad Company *

The Chesapeake and Ohio Railway Company *

Equal Employment Opportunity Commission

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* The Baltimore and Ohio Railroad Company ("B&O") is a subsidiary of the Chesapeake and Ohio Railroad Company ("C&O"); C&O is a wholly owned subsidiary of CSX Corporation. The following companies are non-wholly owned subsidiaries of CSX, C&O, or B&O:

1. The Baltimore and Philadelphia Railroad Company;
2. The Cleveland Terminal & Valley Railroad Company;
3. The Dayton and Michigan Railroad Company;
4. The Dayton and Union Railroad Company;
5. The Western Maryland Railroad Company;
6. The Chicago South Shore and South Bend Railroad;
7. Fruit Growers Express Company;
8. Richmond-Washington Company;
9. Richmond, Fredricksburg and Potomac Railroad Company;
10. Richmond Land Company;
11. Eastern Hardwoods, Incorporated;
12. James Center Development Company;
13. Mid Allegheny Corporation;
14. New Gauley Coal Corporation;
15. Littleton Fuel Company;
16. Western Maryland Company;
17. Atlanta and West Point Railroad Company;
18. Columbia, Newberry and Laurens Railroad Company;
19. Durham and Southern Railway Company;
20. Monon Coal Company, Inc.;
21. Louisville, Henderson & St. Louis Railway Company;
22. Nashville & Decatur Railroad Company;
23. North Charleston Terminal Company;
24. Park-N-Shop, Inc.;
25. The South Carolina Pacific Railway Company;
26. The Western Railway of Alabama.

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Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Baltimore and Ohio Railroad Company and the Chesapeake and Ohio Railway Company hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Appendix A) is reported at 632 F.2d 1107. The opinion of the United States District Court for the District of Maryland dismissing the complaint (Appendix B) is reported at 461 F. Supp. 362 (D. Md. 1978). The opinion of the United States Dis-

trict Court for the District of Maryland denying plaintiffs' motion for reconsideration (Appendix C) is also reported at 461 F. Supp. 362, beginning at page 377.

JURISDICTION

The judgment of the court of appeals (Appendix D) was entered on September 23, 1980. A timely petition for rehearing (Appendix E) was denied December 17, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are set forth in Appendix F. Those provisions are section 4(a) of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(a) (1976); section 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2) (1976 & Supp. III 1979), both as enacted and as amended by section 2(a) of the Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 2(a), 92 Stat. 189; section 7(e) of the ADEA, 29 U.S.C. § 626(e) (1976); section 10 of the Portal-to-Portal Act, 29 U.S.C. § 259 (1976); and Rule 52(a) of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

A. Factual Background

In 1971, petitioners Baltimore and Ohio Railroad Company ("B&O") and the Chesapeake and Ohio Railway Company ("C&O") (collectively "the Companies") faced a grave financial crisis. This crisis was rooted in the pervasive economic ills of the railroad industry and was precipitated by the first national coal strike in twenty-two years.[1] It forced the Companies to make an imme-

[1] Since coal shipments constituted 50% of the Companies' traffic and accounted for 35%-40% of their operating revenues, the coal strike had a devastating impact upon the Companies who were

diate and substantial reduction in their entire work force, including their non-contract management employees.[2]

The Companies' management sought to accomplish this non-contract force reduction in a responsible, humane way and in accordance with legal requirements. The task was very difficult. The non-contract force was disproportionately composed of persons in the forty to sixty-five age group then protected by the ADEA. It contained some junior persons whose skills were essential to business operations.[3] The Companies were able to achieve only a small percentage of the reduction needed through the elimination of all poor performers and those whose functions could be entirely eliminated.[4] Most of the reduction had to be achieved through selection among those whose jobs were being consolidated. The Companies had no performance evaluation system in place on which to base such selections, and *ad hoc* subjective judgments, even if feasible, would have been difficult to defend.[5] A

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already suffering from the excess trackage and overstaffing problems that ultimately led to the demise of the Penn Central Transportation Co. Indeed, the strike forced the Companies to pass a dividend for the first time in nearly 50 years. *See* Marshall v. Baltimore & O. R.R., 461 F. Supp. 362, 366-67 (D. Md. 1978), App. B at 16a-19a; EEOC v. Baltimore & O. R.R., 632 F.2d 1107, 1109 (4th Cir. 1980), App. A at 2a-3a. (Hereinafter, all references to the lower court opinions will be by citation to the Appendix).

[2] In addition to reducing their non-contract work force, the Companies reduced their contract employees in a manner that is not in dispute. All told, approximately 18% of the Companies' 45,000 employees were separated involuntarily in the force reduction.

[3] For example, many employees with technical skills that could not be developed quickly, such as computer programming, fell outside the protected age group.

[4] Indeed, the elimination of all poor performers resulted in only a one percent reduction in the non-contract work force. App. B at 17a.

[5] The Department of Labor has viewed *ad hoc* performance rankings made in the face of an urgent force reduction as inherently suspect. *See* EEOC v. Sandia Corp., 23 Fair Empl. Prace. Cas. 799 (10th Cir. 1980).

lottery was impractical because of differences in job requirements and employee skill and experience.

Given this lack of feasible alternatives the Companies decided to retire those persons below the normal retirement age who were entitled to an actuarially unreduced pension and whose services were not needed for efficient operations.[6] This decision was made specifically to mitigate the economic "impact upon employees who were let go,"[7] and was implemented at significant cost to the Companies.[8] Before reaching this decision, however, the Companies considered the legality of such retirements under the ADEA. They concluded that even if subject to the ADEA, the proposed retirements were exempt under section 4(f)(2) of the Act, 29 U.S.C. § 623 (1976), on the basis of the statute and an interpretative bulletin and opinions of the Wage-Hour Administrator[9] which indicated that section 4(f)(2) "authorized involuntary retire-

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[6] Substantial numbers of non-contract employees aged sixty to sixty-five were retained, either because they lacked pension entitlement or because of reasons of operating efficiency.

[7] App. B at 18a. The Companies' pension plans were among the most generous 10% in American industry and provided those retired with benefits equal to or near their pre-retirement disposable income. In contrast to such benefit entitlements, employees in their forties and fifties, many of whom had substantial family and other obligations, would have received no or only significantly reduced benefits later if they were not retained.

[8] Not only did the Companies incur the full pension costs of those retired and the salary costs of those retained, they also carried a number of persons aged 59 on their payrolls at full pay for up to one year until they could be eligible for an unreduced pension.

[9] At all times relevant to this lawsuit, the Administrator of the Wage-Hour Division of the Department of Labor had authority to issue regulations and bulletins interpreting the ADEA. *See* 29 U.S.C. § 259(b)(1) (1976), incorporated under 29 U.S.C. § 626(e) (1976). This authority was later transferred to the Equal Employment Opportunity Commission ("EEOC"). *See* 29 U.S.C. § 259 (Supp. III 1979).

ment irrespective of age . . . pursuant to the terms" of a bona fide pension plan that was not a subterfuge to evade the Act's purposes. *See* 29 C.F.R. § 860.110 (1978). App. B at 19a; App. A at 9a.

At issue in this litigation are one hundred forty-two employees who were retired on the basis of pension entitlement between the ages of sixty and sixty-five. Significantly, however, even including pension-entitled retirements, a smaller percentage (15.4%) of the ADEA-protected age group (forty to sixty-five) was terminated in the force reduction than of the non-protected employees below age forty (24.4%). The employee group most adversely affected was that under age twenty-five, of which nearly two-thirds was terminated. By contrast, the age group with the lowest termination rate (7%) was the forty to fifty-nine age group. Indeed, because of the advanced age of the non-contract work force, a random termination program would have eliminated more ADEA-protected employees and pulled within its grasp many older employees whose pension entitlement, if any, would have been minimal.

While the 1971 force reduction enabled the Companies to withstand the immediate economic crisis, it did not cure their more deep-rooted overstaffing difficulties. Moreover, the legality of these pension-based retirements had been questioned by the Department of Labor ("DOL") on the ground that the Companies' pension plans did not explicitly permit involuntary early retirement. To meet these concerns, the Companies amended their pension plans in October 1972, effective January 1, 1974, to lower the normal retirement age from age sixty-five to sixty-two. App. A at 3a; App. B at 19a-20a. Before doing so, the Companies once again reviewed the legality of their actions under the ADEA. Once again, they concluded that the proposed action was exempt under section 4(f)(2). Among the administrative interpretations relied upon was a published opinion of the Wage-Hour Administrator which specifically stated:

> The lowering of the retirement age from 65 to 62 years for employees participating in a bona fide retirement plan would not affect the applicability of the exception specified in section 4(f)(2) of the Act.

Opin. Letter of Wage-Hour Administrator, September 6, 1968. *See* App. B at 19a-20a, 39a-40a; App. A at 12a.

The DOL was aware of the proposed changes to the plans in January 1973, a full year before they went into effect. As late as February 1974 its representatives informed the Companies that the amendments would cut off any further liability. It was not until three weeks before suit and months after the changes' effective date that DOL raised any question as to their legality under the ADEA. When DOL brought this suit on June 19, 1974, however, it challenged both the pension-entitled retirements and the reduction of the mandatory retirement age as violative of section 4(a) of the ADEA, which prohibits employment discrimination "because of an individual's age."

B. Decisions Below

On September 6, 1978, the United States District Court for the District of Maryland dismissed the complaint following a bench trial. The court first determined that the challenged actions had constituted prima facie violations of section 4(a), even though the Companies "had an overriding business necessity to reduce their work force," pension entitlement had been used as a selection criterion only to minimize the economic consequences upon their employees, and "other methods of reduction were infeasible." App. B at 17a-18a, 35a. The court went on to hold that the Companies' actions were exempt under section 4(f)(2), which permits an employer to "observe the terms of any bona fide employee benefit plan . . . which is not a subterfuge to evade the purposes of [the ADEA]." App. B

at 30a-35a, 36a-37a.[10] The court concluded, alternatively, that the Companies' actions had been taken in conformity with, and in good faith reliance upon, official DOL interpretations of the ADEA, and thus were exempt from liability under section 7(e) of the ADEA, 29 U.S.C. § 626(e) (1976).[11] App. B at 37a-40a.

The district court's dismissal was predicated on several key factual determinations. In holding section 4(f)(2) applicable to the 1971 retirements, the court specifically rejected DOL's contention that the exemption was unavailable because the terms of the Companies' pension plans did not authorize involuntary early retirement. Rather, interpreting the plans' language in light of their historical operation, the court found that "[t]here is no question that [the Companies] have had the power, exercised over the years, to involuntarily retire employees." App. B at 32a-33a. As for the retirement age reduction, the court disposed of DOL's subterfuge claim on the ground that:

> (a) the plans pre-dated the statute and paid substantial retirement benefits;
>
> (b) the plans' benefit levels had been improved in connection with the age reduction; and,
>
> (c) the reduction was a mere codification of the Companies' historic "power to involuntarily retire

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[10] Prior to its amendment in 1978, section 4(f)(2) had been construed to authorize involuntary retirement. *See* United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977). However, in 1978, Congress overruled the *McMann* holding by adding the following language to Section 4(f)(2):

> [N]o such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual . . . because of the age of such individual.

Pub. L. No. 95-256, § 2(a), 92 Stat. 189.

[11] Section 7(e) incorporates section 10 of the Portal-to-Portal Act, 29 U.S.C. § 259 (1976).

their employees under the consistent application of their plans."

Id. at 36a-37a. Finally, with respect to the good faith reliance defense, the court concluded that as an "objective matter" the Companies "could and did reasonably rely" on the various DOL publications supporting their actions. *Id.* at 39a.

On appeal, the United States Court of Appeals for the Fourth Circuit upheld the trial court's findings of prima facie violations of section 4(a).[12] In its view, age was "a determinative factor" in the Companies' action in the sense that "but for" age, the affected employees would not have been selected for retirement. App. A at 5a. Without suggesting any lawful alternatives to the Companies' action, the court then rejected the lower court's conclusion that those actions were exempt and that the Companies had established a good faith reliance defense to liability.

As to the pension-based retirements, the court held that the absence of unambiguous plan language permitting early retirement at the Companies' option precluded the Companies from "observ[ing] the terms" of their plans as required by section 4(f)(2). *Id.* at 6a-7a. In so doing, the Fourth Circuit implicitly rejected, without finding "clearly erroneous," the district court's factual finding that the Companies had the authority to require early retirement "under the consistent application of their plans." Rather, in the court of appeals' view, such retirements had been made solely as a prerogative of management. *Id.* at 6a-7a. Apparently, the court felt that such management discretion rendered the section 4(f)(2) exemption inapplicable: "A successful 4(f)(2) defense requires that the termination be pur-

[12] After briefing on appeal, the EEOC was substituted as a party for the Secretary of Labor because of the transfer of enforcement responsibilities for the ADEA to that agency.

suant to the pension plan's design—not to a discretionary act of management." *Id.* at 7a.

The district court's finding that the mandatory retirement age reduction was not a "subterfuge" was likewise overridden. *Id.* at 10a-12a. Since the age reduction had been made in response to the Companies' need to reduce their work force, the court reasoned that such action had the inevitable effect of eliminating ADEA-protected employees on the basis of their age. Accordingly, the court held that the age reduction was a "subterfuge designed to evade" the ADEA's goal of promoting the employment of older citizens. *Id.* at 12a.

The Fourth Circuit's reversal of the "good faith reliance" holding was based on much the same reasoning. Since it had concluded that the Companies' plans did not authorize involuntary early retirement, the court determined that the Companies could not have relied reasonably on DOL interpretations indicating that such retirements were permissible. *Id.* at 9a-10a. As for the retirement age reduction, the court held that the Companies could not have relied in good faith on the pertinent opinion because of their awareness of the ongoing DOL investigation of the 1971 force reduction. *Id.* at 12a-13a.[13] Significantly, however, the Fourth Circuit at no point held "clearly erroneous" the district court's determination that, as an objective matter, the Companies had undertaken both actions in good faith reliance on pertinent DOL statutory interpretations.

REASONS FOR GRANTING THE WRIT

The decision below is in conflict with opinions of this Court and decisions of other courts of appeals. It rejects a common sense reading of the ADEA and that statute's

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[13] In so holding, the court apparently assumed incorrectly that the 1972 plan amendments had been called into question in the DOL investigation. This was not the case. *See* p. 6, *supra*.

legislative history. It also flagrantly disregards the facts as found by the trial court.

The result is a decision which ignores economic reality and the nature of the employment relationship and which distorts statutory intent, administrative action and the appellate process. It holds management liable for actions taken in good faith for which there was no feasible alternative. Especially in its denial of a good faith reliance defense in the reduction of the mandatory retirement age, the decision raises substantial questions of due process. It permits government regulators to change their legal interpretation of controlling law without even acknowledging that change and to apply those changes retroactively to the prejudice of those who have specifically relied on those interpretations.

1. The Fourth Circuit's condemnation of the Companies' reasoned response to their economic dilemma raises important questions of first impression concerning a plaintiff's burden of proof in establishing that an employer has subjected him to disparate treatment "because of . . . age" in violation of section 4(a) of the ADEA. Without this Court's guidance, the courts of appeals have grappled with this issue with standards developed under title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* (1976 and Supp. III 1979), most notably, the prima facie case standards enunciated in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).[14] Utilizing these standards, the Fourth Circuit found the Companies guilty of age discrimination even

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[14] *See, e.g.*, Houser v. Sears, Roebuck & Co., 627 F.2d 756, 757 (5th Cir. 1980); Smith v. University of North Carolina, 632 F.2d 316, 332-37 (4th Cir. 1980); Loeb v. Textron, Inc., 600 F.2d 1003, 1014-17, 1019 (1st Cir. 1979); Cova v. Coca-Cola Bottling Co., 574 F.2d 958, 959 (8th Cir. 1978). *But see* Laugesen v. Anaconda Co., 510 F.2d 307, 312 (6th Cir. 1975) (title VII standards should not be applied automatically due to differences in statutes).

though it had been stipulated that the Companies' actions had been based, not on the employees' age as such, but on the employees' entitlement to a pension and a continued source of income. Moreover, there was no evidence suggesting that the Companies' actions had been motivated by age animus or a preference for a younger work force.[15] Rather, the court required no more than a demonstration that age was "a determinative factor" in the sense that "but for" age, the employees would not have been entitled to a pension and thus subject to the job action; the Companies' actual motivation in taking those actions was irrelevant.[16]

Whatever the propriety of this analysis under title VII,[17] it has no place in the ADEA context. Unlike title

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[15] Indeed, any conclusion that age is an impermissible factor is particularly incongruous in the instant case because age was relevant *only* as a condition of eligibility for a substantial fringe benefit, the receipt of which was indisputably the basis for the Companies' actions. *See* p. 14 & n. 23 *infra*.

[16] In this regard, the decision below would appear to conflict with the First Circuit's decision in Loeb v. Textron, Inc., *supra*. While that court also employed a "but for" analysis, it expressly required evidence of discriminatory intent by focusing on the employer's discriminatory motives, and not simply on the employees' age:

> [F]or plaintiff to prevail he had to prove . . . that his age was the "determining factor" in his discharge in the sense that, *"but for" his employer's motive to discriminate* against him because of age, he would not have been discharged.

600 F.2d at 1019 (emphasis added). *See also* Spagnuolo v. Whirlpool Corp., 24 Fair Empl. Prac. Cas. 376 (4th Cir. 1981) in which the Fourth Circuit purported to apply the *Loeb* "but for" analysis, but affirmed a finding of discrimination on the basis of evidence that, in the dissent's view, demonstrated no more than that age was "a factor" contributing to the plaintiff's demotion. *Id.* at 380-81 (Field, J., dissenting).

[17] Of course, title VII requires proof of discriminatory intent where, as here, a case proceeds on a "disparate treatment," as opposed to a "disparate impact" theory. *See, e.g.*, International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

VII, the ADEA is not directed at discrimination based upon immutable human characteristics such as race, sex and national origin. As this Court has recognized:

> While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced "a history of purposeful unequal treatment" or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.

Massachusetts Board of Retirement v. *Murgia*, 427 U.S. 307, 313 (1976); Note, *The Age Discrimination in Employment Act of 1967*, 90 Harv. L. Rev. 380, 383-87 (1976). Consequently, the strong presumption of discriminatory intent present whenever an employer subjects an individual protected by title VII to differing treatment simply does not arise in the age context. *Laugesen* v. *Anaconda Co.*, 510 F.2d 307, 312 n.4 (6th Cir. 1975); *Marshall* v. *Goodyear Tire & Rubber Co.*, 554 F.2d 730, 736 (5th Cir. 1977); Note, 90 Harv. L. Rev. at 394-98. This Court therefore should fashion standards unique for age that will insure that the ADEA is not applied to "rational business decision[s] made in good faith and not actuated by age bias," [18] and, instead, is limited properly to the acts of "arbitrary age discrimination" [19] at which it is directed.[20] *Cf. Vance* v.

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[18] Bishop v. Jelleff Assocs., 398 F. Supp. 579, 593 (D.D.C. 1974).

[19] *See* 29 U.S.C. § 621(b) (1976). Then Secretary of Labor Willard Wirtz aptly described this "arbitrary discrimination" as "discrimination which is the result of *deliberate disregard* of a worker's value solely because of age." *Age Discrimination in Employment; Hearings on H.R. 3651, H.R. 3768 and H.R. 4221 Before the Subcomm. on Labor of the House Comm. on Education and Labor*, 90th Cong., 1st Sess. 8 (1967) (emphasis in original).

[20] Indeed, the creation of such standards is essential to industries, like the railroad industry, which have a disproportionately large

Bradley, 440 U.S. 93 (1979); *Massachusetts Board of Retirement* v. *Murgia*, *supra* (governmental mandatory retirement programs constitutional if rationally based).

Moreover, even if this Court were to find title VII standards applicable, the decision below conflicts with this Court's recent interpretations of *McDonnell Douglas Corp.*, *supra*—*Texas Department of Community Affairs* v. *Burdine*, No. 79-1764, slip op. (March 4, 1981); *Board of Trustees* v. *Sweeney*, 439 U.S. 24 (1978); and *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 (1978). Those decisions make clear that a "prima facie showing [of discrimination] is not the equivalent of a factual finding of discrimination". *Furnco Construction Corp.* v. *Waters*, 438 U.S. at 579. Rather, it "raises an inference of discrimination only [on the assumption that the employer's] acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors". *Texas Department of Community Affairs* v. *Burdine*, No. 79-1764, slip op. at 5 (quoting from *Furnco Construction Corp.* v. *Waters*, 438 U.S. at 577). To rebut that inference, an employer need only "articulate some legitimate nondiscriminatory reason"[21] for his actions, *i.e.*, he need only " 'explain[. . .] what he has done' or 'produc[e. . .] evidence of legitimate nondis-

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number of older employees. As the House Report on the ADEA states:

> The committee . . . recognizes that in some industries, such as the railroad industry, a disproportionately high number of older workers are found in the work force. . . . The committee does not intend that the legislation be administered in such a way as to worsen a situation as this, or to prevent an employer from achieving a reasonable age balance in his employment structure.

H.R. Rep. No. 805, 90th Cong., 1st Sess. 7 (1967). *See also* S. Rep. No. 723, 90th Cong., 1st Sess. 7 (1967).

[21] McDonnell Douglas Corp. v. Green, 411 U.S. at 802.

criminatory reasons.' " *Id.* at 8 (quoting from *Board of Trustees* v. *Sweeney*, 439 U.S. at 25 n.2).[22]

The courts below misapplied these standards. After finding a prima facie case, both courts went directly to the question of whether the Companies had established a section 4(f)(2) defense. App. A. at 6a; App. B at 29a.[23] Neither considered whether the nondiscriminatory motive articulated by the Companies for their pension-based actions—a desire to mitigate the consequences of the force reduction upon their employees as a whole—dispelled the prima facie showing.[24] *Compare City of McKeesport* v. *International*

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[22] Indeed, to meet this burden, the employer "need not persuade the court that it was actually motivated by the proffered reasons." *Id.* at 6.

[23] Such analysis ignores the fact that section 4(f)(2) constitutes an affirmative defense to liability under section 4(a), and *not* a congressional determination that *any* action taken by an employer to "observe the terms of . . . any bona fide employee benefit plan . . . which is not a subterfuge" otherwise violates that provision. Thus, for example, prior to its amendment, section 4(f)(2) exempted the typical, age-based retirements made in the course of a pension plan's normal operation which would have otherwise violated section 4(a) since they were made "because of . . . age." Here, however, the retirements were made, not because of age, but because the Companies faced an overriding business necessity to reduce their work force and the retired employees were entitled to a continued source of income. Accordingly, the courts below should not have reached the section 4(f)(2) question without first concluding that a section 4(a) violation, rather than simply a prima facie case, had been established. For this same reason, Congress' amendment of section 4(f)(2) does not moot the threshold section 4(a) question involved here.

[24] The district court expressly treated the Companies' articulation of a nondiscriminatory motive under section 4(f)(1) of the ADEA, 29 U.S.C. § 623(f)(1) ("differentiation based on a reasonable factor other than age"), as an affirmative defense, and thus as a matter on which they bore the burden of proof. App. B at 29a, 35a. As a result, the court viewed the issue as subsumed in the section 4(f)

Association of Firefighters, 399 A.2d 798, 799 (Pa. Commw. Ct. 1979) (layoff of employees on basis of pension eligibility not "*because of age*"; rather "*because of fact that* [employees] *are eligible for pensions* and therefore will not be without a source of income") (emphasis in original). Indeed, the court of appeals apparently considered the Companies' motivation irrelevant in the belief that the Companies could rebut a prima facie case only by demonstrating the existence of a "business necessity" for their actions. App. A at 5a, 6a. Thus, the court of appeals improperly equated a prima facie case with a finding of discrimination; improperly imposed upon the Companies a burden far beyond the mere "articulation" of a nondiscriminatory reason; and improperly ignored the reasonable, non-age biased ground advanced by the Companies, all in direct contravention of *McDonnell Douglas Corp.* and its progeny.

2. The Fourth Circuit's refusal to credit historical practice in interpreting the terms of a pension plan for purposes of section 4(f)(2)'s "observe the terms" requirement is incompatible with decisions of this Court and other courts of appeals. In *United Air Lines, Inc.* v. *McMann*, 434 U.S. 192 (1977), this Court left little doubt that the "terms" of a plan for purposes of section 4(f)(2) include those created by "established practice." There, as here, a claim was made that the defendant had failed to "observe the terms" of its plan in retiring an employee at age sixty because the plan did not in unambiguous terms authorize mandatory retirement at that, or any other age. *Id.* at 196. However, after construing the plan's language in light of "the manner in which the plan [was] operated in practice" and pertinent arbitration decisions, this Court determined that the

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(2) question and did not accord it separate attention. *Id. But see* Marshall v. Westinghouse Elec. Corp., 576 F.2d 588, 590-92 (5th Cir. 1978) (recognizing that section 4(f)(1), unlike section 4(f)(2), is not a burden shifting defense).

plan, in fact, "*should be regarded as one requiring retirement at age 60 . . . .*" *Id.* (quoting *McMann* v. *United Air Lines, Inc.*, 542 F.2d 217 (4th Cir. 1976) *rev'd*, 434 U.S. 192 (1977) (emphasis supplied by Supreme Court).[25] Similarly, in *Aldendifer* v. *Continental Air Lines, Inc.*, 26 Empl. Prac. Dec. ¶ 31,535 (5th Cir. 1981), at 19,201, the Ninth Circuit held that a plan which did "not expressly provide for mandatory retirement at age 60" was to be considered as such on the basis of plan language indicating that age sixty was the "normal retirement age" and "[the employer's] uniform retirement practices." *See also EEOC* v. *Shell Oil Co.*, 637 F.2d 683 (9th Cir. 1981) (interpreting a plan provision permitting involuntary retirement for "ill health or other cause" to authorize involuntary, age-based retirements).[26]

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[25] Any express language requirement would have been inconsistent with this Court's long recognition of the importance of actual practice to the proper construction of an agreement arising in the labor context. *See, e.g.*, Nolde Bros. v. Local No. 358, Bakery & Conf. Workers Union, 430 U.S. 243, 253 (1977); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581-82 (1960).

[26] The Companies' plans contained language on involuntary retirement at least as specific as that found in the decisions cited above which did no more than identify a "normal" retirement age (*McMann*, 434 U.S. at 196; *Aldendifer*, 25 Empl. Prac. Dec. at 19,201) or empower an employer to require early retirement "for other cause" (*Shell Oil Co.*, 637 F.2d at 634). The C&O plan expressly recognized the Company's right to terminate a non-contract employee at any time. App. G. at 65a. In addition, it specifically provided benefits to an employee "whose service is terminated before his normal retirement date but after he has attained age 55" and, in language added to make clear that employees had the option to do so, entitled certain employees to retire "at their election" at age 60 on an actuarially unreduced pension. *Id.* at 64a-65a. Unless these provisions are read to suggest that an employee retired by the Company between the ages of 60 and 65 lost his pension entitlement, they must be construed, as the

The Fourth Circuit's unambiguous plan language requirement not only runs counter to these decisions,[27] it is inconsistent with section 4(f)(2)'s legislative history. Contrary to the Fourth Circuit's apparent belief, Congress did not fashion the "observe the terms" requirement to prohibit an employer from separating an employee involuntarily unless a pension plan expressly authorized him to do so.[28] Rather, the "observe the terms" requirement was designed to insure simply that the employer actually pays the benefits provided under a plan. This purpose was implicit in proposed section 4(f)(2) which made it lawful to "separate [an employee] involuntarily . . . under a retirement policy or system." S. 830, 90th Cong., 1st Sess. § 4(f)(2) (1967). The phrase "observe the terms" was substituted for this language, not to require explicit employer authorization, but to broaden the exemption to permit flexibility in the amount of benefits provided to newly-hired, older employees. *Age Discrimination in Employment: Hearings on S. 830 and S. 788 Before the Subcomm. on Labor*

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district court found, to authorize early retirement at the C&O's option. Similarly, although the B&O plan was silent on the company's authority to require retirement, it set forth various age and service requirements that triggered pension entitlements beginning at age 55 (*Id.* at 65a-66a) and had been construed to authorize involuntary retirement in the same manner as the C & O plan.

[27] This case is unlike other appellate decisions in which there was neither plan language nor evidence of past practice supporting the employer's right to require retirement. *See* Sexton v. Beatrice Foods Co., 630 F.2d 478, 484-85 (7th Cir. 1980), (distinguishing district court decision herein on that basis); *compare* Benzel v. Valley Nat'l Bank, 633 F.2d 1325, 1327 (9th Cir. 1980) *with* Aldendifer v. Continental Air Lines, Inc., *supra*, and EEOC v. Shell Oil Co., *supra*.

[28] Indeed, it is well established that a pension plan does not define the employer-employee relationship, and that, in the absence of an employment contract, the employment relationship is terminable at will. *See, e.g.*, Craig v. Bemis Co., 517 F.2d 677 (5th Cir. 1975).

of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess. 24 (1967) (statement of Sen. Javits); *see also, United Air Lines, Inc.* v. *McMann*, 434 U.S. at 199-200. As this Court itself recognized in *McMann*, the language substitution did not affect the scope of the proposed exemption for involuntary retirement programs: "the plain language of the statute shows [the exemption] is still there, albeit in different terms." *United Air Lines, Inc.* v. *McMann*, 434 U.S. at 201.

Application of these principles mandates reversal of the decision below. Here, the district court expressly found in findings ignored, but never held clearly erroneous, that the Companies "always had the power to involuntarily retire their employees under the consistent application of their plans," and, in fact, had "exercised [that power] over the years." App. B at 32a, 37a. Indeed, the court of appeals acknowledged that prior to the 1971 reduction in force, the Companies had awarded benefits under the terms of their pension plans to employees separated involuntarily before mandatory retirement age. App. A at 7a. Moreover, there is no evidence indicating that any of the 142 retired employees ever questioned the Companies' authority to require their early retirement.[29] Thus, both in practice and as understood, the plans authorized early retirement at the Companies' option.[30] Under such circumstances, the Companies "ob-

[29] Indeed, the best evidence that the Companies did "observe the terms" of their pension plans is the fact that no retired employee brought an action against the Companies on breach of contract grounds.

[30] In light of the plans' historical operation and the employees' apparent awareness of the Companies' authority to require retirement, any collateral "notice" function served by the "observe the terms" requirement was fulfilled in the instant case. *See* Sexton v. Beatrice Foods Co., 630 F.2d at 484-85; *see also* Gonsalves v. Caterpillar Tractor Co., 634 F.2d 1065, 1067 (7th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3782 (Apr. 21, 1981).

serve[d] the terms" of the plans, and indeed did so in the most meaningful way, when they based their retirement decisions on the availability of benefits under the plans and paid retirees the benefits provided therein.

Finally, the Fourth Circuit's conclusion that the discretion possessed by management under the plans here involved rendered section 4(f)(2) unavailable is in direct conflict with the five other courts of appeals that have considered the question. Those five circuits have ruled unanimously that an employer does "observe the terms" of a plan within section 4(f)(2)'s meaning in requiring an employee to retire under a discretionary, as opposed to a mandatory retirement program. *Carpenter* v. *Continental Trailways*, 635 F.2d 578 (6th Cir. 1980); *Gonsalves* v. *Caterpillar Tractor Co.*, 634 F.2d 1065 (7th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3782 (Apr. 21, 1981); *Jensen* v. *Gulf Oil Refining & Marketing Co.*, 623 F.2d 406 (5th Cir. 1980); *Marshall* v. *Hawaiian Telephone Co.*, 575 F.2d 763 (9th Cir. 1978); *Zinger* v. *Blanchette*, 549 F.2d 901 (3d Cir. 1977), *cert. denied*, 434 U.S. 1008 (1978). Thus, the Fourth Circuit notion that an unambiguous language requirement is essential to protect employees from "a discretionary act of management" finds no support in the pertinent section 4(f)(2) case law.

3. The decision below raises important questions, left open in *United Air Lines, Inc.* v. *McMann*, as to the proper interpretation of the term "subterfuge" in section 4(f)(2). In *McMann*, this Court held that the term "subterfuge" was to be given its "ordinary meaning," as "a scheme, plan, stratagem, or artifice of evasion." 434 U.S. at 203. It therefore concluded that a pension plan adopted prior to the ADEA's enactment could not, as a matter of law, constitute a "subterfuge to evade the purposes of" the Act. *Id.* The Court did not reach the more difficult question of how the "subterfuge" concept is to be applied in the post-ADEA context.

Without this Court's guidance, the court below held that the Companies' reduction of the mandatory retirement age was a "subterfuge," because it occurred after the ADEA's passage and was contrary to the Act's stated purpose "to promote employment of older persons . . . ." App. A at 11a (quoting 29 U.S.C. § 621(b)). The court ignored the legitimate business concerns motivating the Companies' actions, the pre-Act existence and historical operation of the plans, and the substantiality of the benefits paid thereunder. However, if consistency with the ADEA's purpose of promoting employment of older workers is the subterfuge standard, section 4(f)(2) is a dead letter in the post-Act context. Clearly, no employer activity otherwise violative of the ADEA could qualify for the exemption since such conduct, by definition, would be contrary to the Act's goals.

Not surprisingly, the Fourth Circuit's approach contradicts the existing case law. In *Zinger* v. *Blanchette*, *supra*, the Third Circuit, in language quoted with approval in *McMann*,[31] recognized a clear distinction between retirement on an adequate pension and outright dismissal. 549 F.2d at 905. Based on this distinction, the Third Circuit fashioned a rule under which a plan could not constitute an impermissible subterfuge so long as it paid retirees a "reasonable" pension. *Id.* at 909. This same distinction formed the basis for Justice White's conclusion in *McMann* that any plan paying "substantial benefits" was within section 4(f)(2)'s scope:

> Congress intended to exempt from the Act's prohibitions all retirement plans—even those whose only purpose is to terminate the services of older workers—as long as the benefits they pay are not so unreasonably small as to make the "retirements" nothing short of discharges.

434 U.S. at 207 (White, J., concurring).

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[31] 434 U.S. at 198.

While *Zinger* and *McMann* involved pre-Act plans, the Sixth Circuit recently came to a similar conclusion in the post-ADEA context. In *Carpenter* v. *Continental Trailways*, *supra*, the court rejected an employee's claim that a post-ADEA plan necessarily constituted a subterfuge on the basis of evidence indicating "that the plan was a legitimate instrument created to provide for the retirement of the company's employees." 635 F.2d at 581.[32] No inquiry was made into whether the plan was consistent with the ADEA's purposes of promoting the employment of older citizens as, obviously, it was not. Accordingly, this Court should grant certiorari to resolve this conflict and reject emphatically the Fourth Circuit's attempt to read section 4(f)(2) out of the statute.[33]

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[32] *Cf.* EEOC v. Home Insurance Co., No. 78-6242, slip op. (S.D.N.Y. Jan. 21, 1981) (post-Act reduction in mandatory retirement age no subterfuge where legitimate business reasons, and not intent to disadvantage older workers, motivated change); Marshall v. Eastern Airlines, Inc., 474 F. Supp. 364, 369 (S.D. Fla. 1979) (post-Act reduction of mandatory retirement age constitutes subterfuge in absence of "business purpose"); Marshall v. Atlantic Container Line, G.I.E., 470 F. Supp. 71 (S.D.N.Y. 1979) (post-Act reduction of mandatory retirement age is not subterfuge where done for business purpose of, *inter alia*, providing greater promotional opportunities to employees in no-growth industry).

[33] The 1978 amendment to section 4(f)(2) does not diminish the significance of this case. That amendment did not alter the exemption's language, but, instead added a clause making it inapplicable to age-based, involuntary retirements. Thus the issues presented herein as to the proper interpretation of the exemption's "observe the terms" and "subterfuge" language remain for resolution in connection with any other employer action taken in observance of a "bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan." Moreover, even if limited to the involuntary retirements, there are numerous pending lawsuits which turn on an application of section 4(f)(2) in its pre-amendment form. Included among these are government actions seeking massive monetary relief against some of the country's major manufacturing and utility

4. The Fourth Circuit's analysis of the "good faith reliance" defense available under section 7(e) of the ADEA raises important questions of first impression in this Court and is in conflict with at least two other courts of appeals. Section 7(e) of the ADEA incorporates section 10 of the Portal-to-Portal Act which provides that:

> [N]o employer shall be subject to any liability . . . if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of [an] agency of the United States . . . .

To date, this Court has not addressed the proper interpretation of this provision, which is of increasing significance because of the recent proliferation of ADEA litigation. See *EEOC* v. *Home Insurance Co.*, No. 78-6242, slip op. at 15 (S.D.N.Y. Jan. 21, 1981); *Marshall* v. *Atlantic Container Line, G.I.E.*, 470 F. Supp. 71, 72 (S.D.N.Y. 1979).

The need for this Court's guidance is demonstrated by the unreasonable interpretation placed upon the defense below. Purporting to apply an "objective good faith" standard, the court of appeals concluded that the DOL interpretations of section 4(f)(2) relied on by the Companies in effecting the 1971 retirements were not "specific" enough to permit good faith reliance. App. A at 9a-10a.[34] However, the Companies' "unreasonable" interpre-

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enterprises—Marshall v. American Motors Corp., 475 F. Supp. 875 (E.D. Mich. 1979); EEOC v. Consolidated Edison Co., No. 80-1292, slip op. (S.D.N.Y. Jan. 21, 1981); and EEOC v. Liggett & Myers, Inc., No. C-74-163 (M.D.N.C., filed May 20, 1974). The instant case undoubtedly will play an important role in the resolution of these and other pending cases. *See* Benzel v. Valley Nat'l Bank, 633 F.2d 1325 (9th Cir. 1980).

[34] This holding apparently was based on the government's contention that the interpretative bulletin did no more than parrot the

tation of those regulations was identical to that reached by the district court and "quite similar" to that of the Third Circuit in *Zinger* v. *Blanchette*.[35] Similarly, the court of appeals held that the DOL's investigation of the 1971 reduction in force precluded the Companies from relying in "good faith" upon an opinion which, in the district court's view, "sanctioned . . . exactly what defendants did" in reducing the mandatory retirement age, and which had not been withdrawn as late as the trial of this case, some six years *after* the plan amendments. App. B at 39a-40a. *Compare Marshall* v. *Atlantic Container Line, G.I.E.*, 470 F. Supp. at 74 (employer entitled "to rely on published administrative regulation and not the statements of an agency's official"). Taken together, these rulings establish an "objective good faith" standard under which a defendant must demonstrate that *both* his understanding of the administrative interpretation *and* the administrative interpretation itself are correct. That standard, of course, renders the defense meaningless since any employer who could satisfy it would have no need for the defense.

In any event, even if the Court had applied an "objective" test properly, its decision would conflict with decisions of the Second and District of Columbia Circuits.[36] In *Addison* v. *Huron Stevedoring Corp.*, 204 F.2d

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language of § 4(f)(2), a claim that the government also made in connection with the opinion letter which directly addressed the mandatory retirement age reduction issue. *See* Secretary of Labor's Fourth Circuit Brief at 44-49. This contention must be viewed as disingenuous since both the interpretative bulletin and the opinion letter in question were issued to provide guidance for employers. Unless they are to be viewed as traps for the unwary, they must be considered a proper basis for reliance.

[35] *See* App. B at 39a; Zinger v. Blanchette, 549 F.2d at 907.

[36] Like the Fourth Circuit, the Ninth Circuit has adopted an "objective" good faith standard. Kam Koon Wan v. E.E. Black, Ltd., 188 F.2d 558, 562 (9th Cir. 1951).

88, 93 (2d Cir.), *cert. denied*, 346 U.S. 877 (1953), the Second Circuit rejected the "view that 'good faith' [for purposes of the Portal-to-Portal Act] must meet an objective standard of reasonableness." Rather, the court held that a subjective standard governed: "The good faith of the statute requires . . . only an honest intention to ascertain what the . . . Act requires and to act in accordance with it." In *Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429, 464 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978), the District of Columbia Circuit came to the identical conclusion.[37] *Accord, EEOC* v. *Home Insurance Co.*, No. 78-6242, slip op. at 15; *Marshall* v. *Atlantic Container Line, G.I.E.*, 470 F. Supp. at 72.[38] Since there is no doubt that the Companies' unquestioned reliance on the DOL interpretations of the ADEA would satisfy the "subjective" standard applicable in the Second and District of Columbia Circuits,[39] this Court should grant certiorari to resolve the proper interpretation of the term.

5. The court of appeals' flagrant disregard for the district court's findings of fact demands an exercise of this Court's supervisory powers. Under Rule 52(a), Fed. R. Civ. P., a court of appeals is required to accept a district court's findings of fact "unless clearly erroneous." *See, e.g., United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394-95 (1948). That standard prohibits a court of appeals from setting aside findings merely because it

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[37] This conclusion is based on the fact that section 11 of the Portal-to-Portal Act, unlike sections 9 and 10, contains an explicit requirement of reasonableness in addition to that of "good faith," thus making it inappropriate to engraft a "reasonableness" requirement onto the good faith standard. Laffey v. Northwest Airlines, Inc., 567 F.2d at 464; Addison v. Huron Stevedoring Corp., 204 F.2d at 93.

[38] Both *Home Insurance Co.* and *Atlantic Container Line* used a subjective standard in applying the "good faith reliance" defense in the ADEA context.

[39] As the district court pointed out, the DOL did not contest the Companies' "subjective" good faith. App. B at 39a.

"might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent." *United States* v. *National Association of Real Estate Boards*, 339 U.S. 485, 495 (1950). *Accord, e.g., Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 122-23 (1969). Moreover, it requires an appellate court to give special deference to a district court's "[f]indings as to the design, motive and intent with which men act [because such findings] depend peculiarly upon the credit given to witnesses by those who see and hear them." *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341 (1949). *Accord, e.g., Earle* v. *W.J. Jones & Son*, 200 F.2d 846, 847-48 (9th Cir. 1952); *see also* Fed. R. Civ. P. 52(a).

The Fourth Circuit grossly departed from these standards. The district court based its holding on several key factual findings concerning the actual operation of the pension plans, the Companies' motives in engaging in the challenged actions, and the Companies' good faith reliance upon official DOL interpretations of the ADEA.[40] The court of appeals at no point held any of these factual determinations "clearly erroneous." Rather, it ignored them and engaged in a *de novo* evaluation of the evidence to support its contrary legal conclusions.

While not exhaustive, the following examples demonstrate the point. In finding section 4(f)(2) inapplicable to the pension-based retirements, the court of appeals at

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[40] Regardless of whether an objective or subjective standard governs, it is well established that a district court's determination as to whether an employer has satisfied the "good faith" requirement of the Portal-to-Portal Act is "a question of fact that will be modified on appeal only if shown to be clearly erroneous." Hodgson v. Miller Brewing Co., 457 F.2d 221, 228 (7th Cir. 1972). *Accord*, Laffey v. Northwest Airlines, Inc., 567 F.2d at 464; Addison v. Huron Stevedoring Corp., 204 F.2d at 93; Lassiter v. Guy F. Atkinson Co., 176 F.2d 984, 993 (9th Cir. 1949); Day & Zimmerman, Inc. v. Reid, 168 F.2d 356, 360 (8th Cir. 1948).

no point addressed the district court's conclusion, based upon oral and written evidence of the pension plans' actual operation, that the Companies did, in fact, have the option to retire their employees early "under a consistent application of their plans." App. B at 37a. Rather, the court simply recharacterized the evidence as demonstrating no more than that the Companies historically had terminated employees prior to mandatory retirement age and provided them with pension benefits. App. A at 6a-7a. Likewise, even though the district court heard extensive testimony concerning the Companies' decision to lower the mandatory retirement age and their express reliance upon the DOL interpretations of the ADEA in doing so, the court of appeals rejected its conclusion that the Companies had acted in "good faith." Apparently, the court of appeals determined that such testimony was not credible in the face of the DOL investigation of the 1971 force reduction which was ongoing at the time of the plan amendments, even though the legality of the age reduction was at no time questioned during the course of that investigation.[41]

In short, the court of appeals not only engaged in the very sort of "appellate trial" that Rule 52(a), Fed. R. Civ. P., is designed to prohibit, but also did so in a manner far departed from the accepted and usual course of judicial proceedings. This Court, therefore, should exercise its supervisory powers to insure compliance with a rule essential to the orderly and proper administration of justice.

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[41] If the court of appeals did, in fact, have some legitimate concerns as to the adequacy of the district court's fact-finding, it should have remanded the action, rather than have engaged in a *de novo* evaluation of the evidence. Petitioners urge this Court to follow this course if it concludes that the factual record provides an insufficient basis for resolution of the issues.

CONCLUSION

For all the reasons stated above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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Dated: May 16, 1981

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 79-1210

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Appellant,

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY AND THE CHESAPEAKE AND OHIO RAILROAD COMPANY,
Appellees,

EQUAL EMPLOYMENT ADVISORY COUNCIL,
Amicus Curiae.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Appellee,

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY AND THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Appellants,

EQUAL EMPLOYMENT ADVISORY COUNCIL,
Amicus Curiae.

Appeal from the United States District Court for the District of Maryland, at Baltimore
Edward S. Northrop, Chief Judge

Argued: February 6, 1980 Decided: September 23, 1980

Before BUTZNER, HALL, and SPROUSE, Circuit Judges.

SPROUSE, Circuit Judge:

This is an appeal by the Secretary of Labor,[1] United States Department of Labor (Secretary), from a judgment of the district court in favor of the defendants, Baltimore and Ohio Railroad Company (B & O) and The Chesapeake and Ohio Railway Company (C & O), whose management has been consolidated since 1963 (hereinafter collectively railroad companies or companies). The Secretary brought the action contending the railroad companies violated the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.* (ADEA or the Act), by involuntarily terminating 142 employees based on their age—related entitlement to a pension and by amending the railroad companies' pension plans in 1972 to lower compulsory retirement age for other employees from age 65 to age 62. The district court, after a bench trial, found prima facie violations of the Act. It held, however, that the companies' action were a permissible exception under the Act and found for the defendant railroad companies. The Secretary appeals the finding of an exception and the companies cross-appeal the court's finding of prima facie violations. We agree there were prima facie violations of the Act but reverse the court's holding in favor of the companies as to the exception.

In 1971 a nationwide coal strike by the United Mine Workers Union precipitated a financial crisis for the companies, although their financial positions had declined uniformly for some years prior to that. As a step in resolving the financial crisis, the railroad companies determined, among other things, to reduce the size of the

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[1] The Equal Employment Opportunity Commission was substituted as the Appellant-Cross-Appellee after the briefs were filed in this appeal. The enforcement responsibilities for the Age Discrimination in Employment Act of 1967 have been transferred to the Equal Employment Opportunity Commission.

work force. First reduced was the number of employees subject to the collective bargaining agreements. The legality of that action is not involved in this appeal. The number of workers not subject to collective bargaining agreements was then reduced.

One hundred forty-two employees from the latter group were selected for involuntary retirement because they qualified for pension benefits. Their eligibility under both the C & O and B & O pension plans was based solely on age and years of service. They were retired commencing in October, 1971. At the time of termination they were either ages 60 to 62 with at least twenty years of service or ages 62 to 65 with at least ten years of service.

Management considered and rejected several alternatives to reducing the work force by the age-based method, including the possibility of terminating the youngest employees or the employees with least seniority. It is not clear why these alternative were rejected. At one point in the testimony the companies' Senior Vice-President indicated that some younger people had skills with new technology which could not be developed by older people. The railroad companies did not attempt to rank their employees by performance, since such as attempt was not considered practical. The rairoad companies next amended both their pension plans in 1972 to provide for involuntary retirement at age 62 to be effective in 1974.

The Secretary contends that the selection of the 142 employees for forced retirement by age category violated section 4(a)(1) of the ADEA, 29 U.S.C. § 623(a)(1). He argues that the railroad companies again violated the age discrimination prohibition by amending their pension plans to require retirement at age 62. The district court found prima facie violations of the Act but found the railroad companies' actions justified under § 4(f)(2) of the Act. This subsection then permitted involuntary retirement based on age if done to observe the terms of a

bona fide pension or retirement plan. We agree the companies' actions were prima facie violations of the Act. We do not agree that the forced retirements were based on the railroad companies' pension plans.

I. THE ADEA

Relevant subsections of section 4 of the ADEA provide:

4(a)

> It shall be unlawful for an employer—(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . .

29 U.S.C. § 623(a)(1).

4(f) (prior to its Congressional amendment in 1978)

> It shall not be unlawful for an employer
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual . . . .

29 U.S.C. § 623(a)(2).

II. THE PRIMA FACIE DISCRIMINATION

An employer is prima facie guilty of discrimination if its actions are based in part on employees' ages. *Loeb* v. *Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979). It is, of course, necessary that age be a determinative factor, but not the sole determining factor. *Loeb*, 600 F.2d at 1019; *Mary Carroll Smith* v. *University of North Carolina at Chapel Hill, John H. Schutz; Ruel W. Tyson, Jr.*, —— F.2d ——, Nos. 79-1221, 79-1222 (4th Cir. 1980).

The undisputed facts in this case show that the 142 employees were selected for forced retirement because of their age and time in service. The railroad companies' economic crisis precipitated the necessity for reducing their work force. That factor, however, provided no incentive for the layoff or retirement of this particular group: "but for" their age, they would not have been selected for retirement. This establishes a prima facie violation of the Act. *Loeb*, 600 F.2d at 1019. This reasoning applies with even greater force to the action of the companies reducing the mandatory retirement age from 65 to 62.

III. THE PLANS

The C & O plan authorizes compulsory retirement at the normal retirement age of 65.[2] The B & O pension plan contained no provision concerning normal or "compulsory" retirement.[3]

Although there were no provisions in either company's plan for compulsory or involuntary retirement prior to age 65, there was uncontradicted evidence that the railroad companies had, in the past, involuntarily terminated some such employees and granted them pension benefits in accordance with the terms of the plans. Mr. Clarke, the Vice-President of the railroad companies in charge of the law department, testified that past terminations were based on "an inherent right of management in managing the business—In managing personnel. It has nothing to do with the plan." He reiterated, "[t]he company has

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[2] The C & O plan provides in part:

> Compulsory Retirement. In order to qualify for a retirement allowance under the Supplemental Plan, a member shall retire from service not later than the last day of the calendar month in which he attains age 65, hereinafter referred to as the "normal retirement date".

[3] A published B & O document entitled "Highlights", however, included information under a heading entitled "Retirement Dates" which referred to age 65 as "normal retirement".

that right irrespective of the plan." The President of the railroad companies and other officials gave similar testimony as to management rights.

IV. COMPANIES' ACTIONS WERE NOT BASED ON PENSION PLANS

A. *THE INVOLUNTARY RETIREMENT OF 142 EMPLOYEES IN 1972.*

The Secretary, by showing the involuntary retirement of the 142 individual employees because of their age and pension entitlement, proved a prima facie case of age discrimination under the Act. *Loeb, supra; Mary Carroll Smith, supra; Price* v. *Maryland Casualty Co.*, 561 F.2d 609 (5th Cir. 1977). It then became the railroad companies' burden to successfully provide a 4(f)(2) defense. They were required to show: (1) that the involuntary retirement was to observe the terms of a (2) bona fide pension plan and that (3) the plan is not a subterfuge to evade the purposes of the Act.

Neither the C & O nor the B & O pension plans contained provisions allowing the companies to involuntarily retire employees under the age of 65. The C & O plan provides that the "normal" retirement age is 65. The B & O plan is silent in this respect, but "Highlights", published in connection with the plan, indicates that the normal retirement age is also 65 for that plan. It would be extremely difficult, therefore, to conclude that the railroad companies involuntarily retired the involved employees prior to age 65 by observing the terms of a bona fide pension plan.

The railroad companies concede there is no explicit language in the plans indicating a company prerogative to involuntarily retire employees. They contend, however, that the railroad companies' right to do so has become an unwritten part of the plans by the past practice of uni-

laterally terminating employees and providing them pensions if they were eligible at the time of termination. There is nothing in the record, however, showing either the reasons for, or the frequency of, the various terminations. The President of the railroad companies, the Vice-President in charge of the legal department, and other officials categorically assert that such right of involuntary termination is an inherent right of management having nothing to do with the pension plans.

The record contains no specific examples of these terminations, but it can be assumed they were for reasons as varied as the world of employer-employee relationships. It is undisputed that all these previous terminations were both unrelated to the pension plans and made under company authority exclusive of the pension plans. If such discharged employees were entitled to a pension, the right was earned by service to the railroad companies and was vested despite discharge, not because of it. The mere allowance of a pension at the time of discharge by virtue of broad management policies is not a defense inherent in the scheme of section 4(f)(2). A successful 4(f)(2) defense requires that the involuntary termination be pursuant to the pension plan's design—not to a discretionary act of management.

The Supreme Court, in *United Air Lines, Inc.* v. *McMann*, 434 U.S. 192, 98 S.Ct. 444, 54 L.Ed.2d 402 (1977), concluded that United had observed the terms of a concededly bona fide pension plan in retiring an employee at the "normal retirement" age of 60. The Supreme Court adopted the Fourth Circuit's reasoning that, due to United's past practice of involuntarily retiring individuals under the plan at age 60, the term "normal retirement" meant involuntary retirement at age 60. *Id.* at 196, 98 S.Ct. at 447. Similarly, the Court of Appeals for the Third Circuit, in *Zinger* v. *Blanchette*, 549 F.2d 901 (3rd Cir. 1977), *cert. denied*, 434 U.S. 1008, 98

S.Ct. 717, 54 L.Ed.2d 750 (1978), (quoted favorably by the Supreme Court in *McMann*), considered a system which explicitly provided for the involuntary retirement of any employee between the ages 60 and 65 at the company's option. *Zinger* held that the company was justified in retiring such employees under the terms of its retirement plan. The Court of Appeals for the Sixth Circuit in *Thompson* v. *Chrysler Corp.*, 569 F.2d 989 (6th Cir. 1978), likewise considered and allowed retirement pursuant to a plan containing specific involuntary retirement provisions. *See also Brennan* v. *Taft Broadcasting Co.*, 500 F.2d 212 (5th Cir. 1974) (allowing a subsection 4(f)(2) defense where the involved plan contained an explicit compulsory retirement at age 60). In all these cases the plans provided for involuntary retirement prior to the age of 65.

The railroad companies maintained pension plans for many years—paying substantial benefits. The plans are clearly bona fide. There was no authority, however, in the plans to involuntarily retire employees prior to the age of 65. The railroad companies' actions in forcing retirement on the 142 individual employees, therefore, could not have been to observe the terms of the plans. The plans, for this reason, provide no basis for a section 4(f)(2) defense.

The railroad companies assert that they relied on the Labor Department's published opinions in assuming the legality of the involuntary retirements. They contend, therefore, that the Secretary's complaint on behalf of the 142 employees is barred by section 7(e) of the ADEA, 29 U.S.C. § 626(e), which incorporates section 10 of the Portal-to-Portal Act of 1947, 29 U.S.C. § 259(a). Section 10(a) provides in part:

> In any action or proceeding . . . no employer shall be subject to any liability or punishment . . . if he pleads and proves that the act or omission complained of was in good faith in conformity with and

> in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States ....

Railroad company officials insist they relied on several Wage-Hour opinion letters and an ADEA Interpretative Bulletin, 29 C.F.R. § 860.110 (1978). This bulletin states:

> (a) [T]he Act authorizes involuntary retirement irrespective of age, provided that such retirement is pursuant to the terms of a retirement or pension plan meeting the requirements of section 4(f)(2). The fact that an employer may decide to permit certain employees to continue working beyond the age stipulated in the formal retirement program does not, in and of itself, render an otherwise bona fide plan invalid insofar, as the exception provided in section 4(f)(2) is concerned.
>
> (b) This exception does not apply to the involuntary retirement before 65 of employees who are not participants in the employer's retirement or pension program.

In *Pilkenton* v. *Applachian Regional Hospitals, Inc.*, 336 F.Supp. 334, 340 (W.D. Va. 1971), it was said that "in order for an employer to assert that it relied on and conformed to an administrative bulletin, the bulletin must be specific enough to cover the particular employment situation," and, in *Clifton D. Mayhew, Inc.* v. *Wirtz*, 413 F.2d 658 (4th Cir. 1969), this Court held that an employer, to take advantage of section 10(a), must prove a good faith reliance by objective evidence. The interpretive bulletin, on which the defendant railroad companies claim reliance, refers to the terms of the pension plan itself. The bulletin instructs that involuntary retirement irrespective of age is permissible, if pursuant to the terms of a pension plan. Assuming, as we have here

held, that the railroad companies' plans contain no such authorization, it is circular reasoning to argue that the railroad companies could involuntarily retire protected employees on the basis of the Secretary's interpretive bulletin directing them to examine their plans. The interpretive bulletin does not have the specificity required by *Pilkenton*, nor is there objective evidence that the railroad companies relied on it in good faith.

B. THE COMPANIES' 1972 PENSION PLANS PROVIDING FOR INVOLUNTARY RETIREMENT AT AGE 62.

The railroad companies' amendments to their pension plans made in October, 1972, and effective January 1, 1974, reduce the mandatory retirement age from age 65 to age 62. Since 1974 some employees have been involuntarily retired at age 62 under the amended plan. Although also governed by the Act, the railroad companies' 4(f)(2) defense of those amendments fails—but under a different application of the statute.

Subsequent to the 1972 changes in the railroad companies' plans, Congress amended section 4(f)(2) to explicitly prohibit its provisions from being utilized as a defense to involuntary retirement of protected individuals. The amendment was effective from enactment on April 6, 1978, and provides:

> (f) It shall not be unlawful for an employer . . .
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual, *and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual speci-*

> *fied by section 12(a) of this Act [29 U.S.C. § 631(a)] because of the age of such individual.*

29 U.S.C. § 623(f)(2) (1978 amending language emphasized).

The Secretary contends this Congressional amendment is applicable to the railroad companies' actions in 1972. We do not decide this but, even leaving aside the question of the possible retroactivity of the 1978 amendment to section 4(f)(2), the 4(f)(2) defense of the amended retirement plan is unavailing—the railroad companies' 1972 amendments to the plans, unlike the original plans and previous amendments, is a "subterfuge to evade the purpose of this chapter."

The testimony was unequivocal that the 1971 coal strike had a devastating impact on the railroad companies, precipitating drastic action to reduce the number of employees. Terminated were management employees, inefficient employees, and then those entitled to pension benefits because of their age and service. Following quickly on the heels of those actions, the Board of Directors approved the amendment to effect continued forced retirements based on age in October 1972. The President of the railroad companies testified that he had long considered reducing the number of employees by lowering the mandatory retirement age to age 62.

There is certainly nothing sinister about a chief executive's design to "cut the cloth to fit the pattern;" drastic action by the railroad companies were [sic] certainly required. The ADEA, however, prohibits personnel reduction on the basis of the age of individuals in the protected group. Section 2(b) of the Act states its purposes:

> to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers

> and workers find ways of meeting problems arising from the impact of age on employment.

29 U.S.C. § 621(b). Under the circumstances in which the pension plans of the railroad companies were amended, it is clear that the amendments were designed to evade the ADEA's goals as expressed in § 2(b).

The railroad companies assert that their actions in amending the plans were also justified under section 10 (a) of the Portal-to-Portal Act. Vice-President Clarke, in charge of the law department, apparently read administrative interpretations of the Act prior to the adoption of the amendments reducing the mandatory retirement age from age 65 to 62. The material, including a 1968 opinion letter of the Wage-Hour Administrator, is generally supportive of the railroad companies' position that the action did not violate the ADEA. Clarke indicated his opinion as to the legality of the railroad companies' actions was based on his readings of these interpretations, his conversation with a non-lawyer employee, and on his own interpretation of the law. He apparently did not express this opinion to those officers considering the amendments, but indicated his approval by not objecting to the amendments.

The requisite for a defense under section 10(a) is that it be made "in good faith and in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation . . . ."

The first specific consideration by a company official to amend the pension plan by reducing the mandatory retirement age from 65 to 62 was by Vice-President Clarke in May, 1972. In December, 1971, the Department of Labor had initiated an investigation of the railroad companies' practice of involuntarily retiring members of the ADEA-protected group of 142 individuals prior to the age of 65. The railroad companies were aware of this

investigation months prior to the first consideration of possible amendments. In March, 1972, and again prior to consideration of the amendments, the Secretary's representative advised railroad officials of the results of the investigation: the companies were in violation of the ADEA. Yet only a few months afterward—in October, 1972—the Board of Directors finally approved the amendment to the plan.

In light of this sequence of events indicating the railroad companies' specific knowledge of the discriminatory character of their conduct, they have not proved a section 10(a) defense. They have not established, by objective evidence, that good faith reliance on an administrative interpretation as required by *Clifton D. Mayhew, Inc., supra. See also Marshall* v. *Emersons Ltd.*, 593 F.2d 565 (4th Cir. 1979).

That portion of the district court's decision finding prima facie violations is affirmed. The decision finding the violations excused under section 4(f)(2) is reversed and the case is remanded for action consistent with the views of this opinion.

AFFIRMED IN PART; REVERSED IN PART.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil Action No. N-74-637

RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY and THE CHESAPEAKE AND OHIO RAILWAY COMPANY

Filed: September 6th, 1978

NORTHROP, Chief Judge.

This action was filed on behalf of the Secretary of Labor on June 19, 1974. In the complaint, the Department of Labor (Department) charged the Baltimore and Ohio Railroad Company (B & O) and the Chesapeake and Ohio Railway Company (C & O) with violating Section 4 of the Age Discrimination in Employment Act of 1967, (29 U.S.C. § 621 *et seq.*). Counsel for both plaintiff and defendant railroads have submitted the following issues to this Court for resolution:

(1) Whether the Department satisfied the conciliation requirement of the Age Discrimination in Employment Act prior to filing his complaint; and if not, the legal effect of the parties' subsequent conciliation discussions.

(2) Whether the Secretary's complaint includes individuals terminated from non-contract status after March 1, 1972.

(3) Whether the selection in the force reduction of the 142 individuals at issue on the basis of their entitlement

to an unreduced pension under defendants' pension plans constituted discrimination on the basis of age in violation of Section 4(a) of the Act.

(4) Whether the termination of 142 employees at issue was exempt under the Act by virtue of Section 4(f)(2).

(5) Whether the lowering of the mandatory retirement age under defendants' pension plans from 65 to 62 constituted discrimination on the basis of age in violation of Section 4(a) of the Act.

(6) Whether the retirement of employees at the mandatory age of 62 under defendants' pension plans, as amended in 1972, was exempt under the Act by virtue of Section 4(f)(2).

(7) Whether, based on their reliance on written interpretations of the Act by the Department, defendants are exempt from any liability in this action by virtue of Section 10 of the Portal-to-Portal Act of 1947, 29 U.S.C. § 259 (1970).

Issues (1) and (2) were tried on April 27 and 28, 1978. The remaining issues were tried on May 17-25, 1978. Counsel for both plaintiff and defendants have submitted exhaustive pretrial and post-trial memoranda. Prior to the disposition of the above issues, the Court will outline the relevant background facts in this case in conformance with the mandate of Rule 52 of the Federal Rules of Civil Procedure. Additional facts will be added throughout the opinion where necessary.

Facts

Defendant railroads are common carriers engaged in the transportation of freight by rail. It is clear that they are employers affecting commerce within the meaning of Section 11(b) of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 630(b).

On December 17, 1962, the Interstate Commerce Commission approved the acquisition by C & O of B & O through the purchase of B & O capital stock, effective February 4, 1963. Thereafter, the management of the railroads was consolidated.

In 1971, a nationwide coal strike by the United Mine Workers Union precipitated several actions by defendants. Since this suit concerns, *inter alia*, the legality of defendants' response to the strike, the facts underlying the decisions made by defendants' management must be explored.

During the years preceding 1971, defendants' financial position was declining. During the period 1965-70, the defendants' level of traffic had not increased, and their expenses had increased more rapidly than their revenues.

The defendants' declining financial position was reflective of the general trends in the railroad industry, particularly in the Northeast. This situation was accentuated by the failure of the Penn Central Railroad which went into receivership in June 1970.

In April 1971, Mr. Hays T. Watkins became President and Chief Executive Officer of defendants. Mr. Watkins believed that the existing economic and financial situation required that defendants streamline their operations and eliminate unnecessary expenses. To achieve this goal, Mr. Watkins established two priorities: the abandonment of unprofitable branch lines and a reduction in the size of the work force. Steps were taken immediately to carry out these objectives.

The goal of reducing the size of the work force was based upon top management's belief that defendants had too many employees relative to their level of traffic. This overstaffing was present to approximately the same extent in both the contract (union) and non-contract (supervisory personnel) ranks.

In September 1971, Mr. Norman Halpern became Assistant Vice President—Executive Department. In order to implement the reduction of staff, he ordered that no new non-contract employees could be hired without the specific approval of Mr. Watkins. Other methods for reducing the work force were discussed.

On October 4, 1971, a nationwide coal strike began. Although defendants were aware that the contract between the United Mine Workers Union and the coal operators would expire on September 30, 1971, they did not anticipate a strike since there had not been a nationwide coal strike since 1949. Moreover, early indications were that the parties would be able to agree on a contract and thus avoid a strike.

The coal strike represented a severe financial threat to defendants since coal constituted approximately 50% of defendants' traffic and 35-40% of their operating revenue. Since it appeared that the strike would be protracted, defendants believed that they were required to take immediate action to reduce expenses.

The first step taken by defendants involved a reduction in their contract work force which comprised 93% of defendants' employees. Although defendants furloughed many employees in order to cut down expenses, defendants also decided to reduce their contract work force by approximately 20%. Management subsequently decided that a comparable reduction in the non-contract work force was necessary.

Meetings by defendants' top management resulted in a program for reducing the size of the work force. Preliminarily, all poor performers were eliminated, but this resulted in only a 1% reduction. The next step was an attempt to eliminate as many jobs as possible and to consolidate the rest.

One of the criteria used to select individuals to be terminated was "pension entitlement." Through pension

entitlement, management designated individuals who were entitled to substantial pension benefits if terminated. Management decided that it would be preferable to terminate these employees since they would be less adversely affected by the loss of a job than individuals who were not entitled to receive pension benefits. In this way management hoped to reduce the impact upon employees who were let go. Out of the employees terminated in this reduction, 142 were selected because of their entitlement to pension benefits.

Although other methods of reducing the size of the work force were considered, they were rejected either because they were not suited to a solution of defendants root problem (overstaffing) or because of the lack of empirical data necessary to implement them. For example, defendants did not attempt to merely furlough many of their employees since one of defendants' basic problems was their overstaffed condition. Neither did defendants attempt to rank their employees by performance since such an attempt would not have been practical.

During the period of time in which the feasibility of using pension entitlement as a criterion for selecting employees for termination was discussed, defendants' law department was consulted as to the legality of the proposed reduction. At that time Mr. Owen Clarke was defendants' Vice President of Personnel and Labor Relations and an experienced attorney. Mr. Frank Householder was an Assistant Vice President in charge of Equal Employment Opportunity Services. Messrs. Clarke and Householder discussed the effect of the ADEA upon the proposed reduction. They concluded that, based upon published opinions of the Wage-Hour Administrator, the proposed reduction was exempted from the ADEA under the provisions of § 4(f)(2). The determination was relayed to Mr. Watkins and relied on by top management in deciding to go forward with the reduction.

The reduction of employees took place in accordance with the above plans. During mid-October 1971 to March 1, 1972, most of the employees were terminated, although some of them were carried on defendants' payroll for some time later.

On November 15, 1971, the coal strike ended. Defendants' Board of Directors advised their stockholders that, as a result of the coal strike, defendants would not pay any dividend for the fourth quarter of 1971. This represented the first occasion since 1922 that defendants had failed to pay a dividend.

In December 1971, the Department instituted an investigation into alleged violations of the ADEA by defendants. This investigation was undertaken by Assistant Area Director Anthony Kiggins.

Mr. Kiggins met with several of defendants' officers in early 1972 to talk over the legality of defendants' reduction in force. During the course of several meetings, information was provided by defendants and both sides discussed the reduction and defendants' legal defenses. After a meeting on March 13, 1972, in which Mr. Kiggins informed defendants of his conclusion that they had violated the ADEA, he referred the investigative file to his Regional Solicitor.

Shortly thereafter, defendants began considering another method of reducing the size of their work force. Mr. Clarke, who had become defendants' principal legal officer on May 1, 1972, undertook consideration of lowering the mandatory retirement age from 65 to 62 under defendants' pension plans.

Mr. Clarke was aware of an opinion letter written by the Wage-Hour Administrator, dated September 6, 1968, which he interpreted to hold that the reduction in a mandatory retirement age under a pension plan from 65 to 62 did not affect the availability of the exemption in

Section 4(f)(2) of the ADEA. Accordingly, when defendants' management consulted the Law Department, they were advised that such a reduction would be lawful. On October 16, 1972, defendants' Board of Directors approved amendments to the pension plans which lowered the mandatory retirement age from 65 to 62. These amendments were to take effect on January 1, 1974.

On January 23, 1973, Mr. Kiggins met with several of defendants' officers to obtain further information in reference to the Department's investigation. The investigative file and the additional data were subsequently reviewed by the Office of the Regional Solicitor in Philadelphia.

No further contact was had between the parties until December 1973. Several meetings between attorneys for both sides occurred between December 1973 and June 1974. At these meetings, the Department informed defendants that it believed that its investigation disclosed violations of the ADEA. Defendants responded by asserting their legal defenses and offering additional information. On June 19, 1974, the Department filed the complaint in this case charging defendants with willful violations of the ADEA.

Defendants moved to dismiss the complaint on July 22, 1974, alleging that the Department had failed to conciliate the matters alleged in the complaint as required by law. On November 8, 1974, this Court heard oral argument on the motion to dismiss. This Court ordered the parties to engage in further conciliation. The parties did subsequently attempt to conciliate the claims and now agree that adequate efforts to conciliate have been made.

Law

I. *The Adequacy of Conciliation and this Court's Jurisdiction*

Section 7(b) of the ADEA, 29 U.S.C. § 626(b) provides in pertinent part:

> Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

Almost immediately after the Department filed its complaint, defendants responded with a motion to dismiss alleging that the Department had failed to satisfy this requirement. This Court then directed the parties to further conciliate and they have done so. Defendants have renewed their previous motion, however, and alleged that it is "jurisdictional."

Defendants' position may be summarized as follows. Section 7(b) requires the Department to engage in exhaustive and thorough efforts to conciliate alleged violations of the Act prior to filing suit. The Department's actions in this case, which consisted of an investigation followed by months of inaction culminating in three very short conferences, fails to satisfy this burden. The stay issued by this Court is ineffective to cure the inadequacy of the Department's pre-complaint activities since Section 7(b) is a mandatory provision requiring conciliation as a jurisdictional condition precedent to suit. Accordingly, the action should be dismissed or considered timely filed only as of the date the post-complaint discussions were completed.

The Department responds that reasonable efforts to conciliate this case were in fact attempted and were met

with rebuffs from defendants. In the alternative, the Department argues that this Court's Order staying the proceedings until conciliation had been effected was the proper course since Section 7(b) is not jurisdictional.

The facts surrounding the pre-complaint conciliation efforts are somewhat muddled, although attorneys for both sides testified. Both sides agree that Mr. Kiggins had several investigatory meetings with defendants' officers. They agree that a closing conference was held on March 13, 1972 between Mr. Kiggins and defendants' representatives. The next meeting was held on January 23, 1973 when Mr. Kiggins requested additional information from defendants. The parties are in further agreement that on December 26, 1973 a meeting for the purpose of conciliation was held between attorneys for both sides. The parties followed this meeting with meetings on February 21, 1974 and May 30, 1974. During this time defendants agreed to toll the statute of limitations.

This court has determined that it will adopt both aspects of the November 8, 1974 decision:

(1) The Department's pre-complaint conciliation efforts were inadequate to satisfy Section 7(b) of the Act; and

(2) the Court has the discretion to retain jurisdiction of the case while adequate conciliation is effected.

The Court cannot agree with the Department's contention that its pre-complaint actions satisfied the statute. The chronology of the actions leading up to the filing of the complaint indicate that after Mr. Kiggins informed defendants of his opinion that they had violated the Act, no meaningful discussions were held between the parties for almost two years. Moreover, despite the fact that numerous employees were involved, the three conciliation meetings were very short and the other correspondence was anything but comprehensive. Al-

though defendants did not agree with the Department's legal assessment of the case and raised issues which are similar to the ones that are to be decided in this opinion, it is significant that they agreed to toll the statute of limitations while discussions took place. Accordingly, the Court cannot accept the Department's assertion that they were faced with a totally recalcitrant employer who refused to come into compliance. Conciliation and settlement is a two-way street—the defendants are not required to either surrender completely or face suit if they are willing to informally discuss the case and toll the statute of limitations to prevent prejudice to the Department.

The Department's citation of *Hodgson* v. *Approved Personnel Service, Inc.*, 529 F.2d 760 (4th Cir. 1975) is also not persuasive. In that case, the Fourth Circuit held that Section 7(b) was satisfied by five contracts with defendants over a period of four years. The case, however, turned on the fact that defendant had made repeated assurances to the Department that it would obey the law followed by further violations. In the instant case, the Department was met with the companies' legal defenses, and consequently additional informal methods of conciliation were required.

Although this Court does not agree with defendants' assertion that the Department's conciliation efforts must be "exhaustive," it does appear to the Court that they should at least afford the employer the opportunity to discuss the individual circumstances surrounding the alleged violations. A recent opinion by Judge Blumenthal, *Marshall* v. *Hartford Fire Insurance Co.*, 78 F.R.D. 97 (D.Conn.1978) provides a thorough analysis of the Department's burden in ADEA cases. Judge Blumenthal held, *inter alia*, that a defendant should be given an opportunity to respond to the Department's charges, and to discuss cases individually. If it appears that defend-

ants are using this individual discussion as a tactic to delay, however, the Department may be justified in taking other actions. *Marshall* v. *Hartford Fire Insurance Co., supra* at 106-07. The court concluded that the ten full days of negotiation was an adequate amount of time to discuss the 72 cases of age discrimination charged by the Department. This Court accordingly concludes that the conciliation attempts by the Department, particularly in a case of this magnitude (coupled with defendants' willingness to toll the statute of limitations) were inadequate to satisfy Section 7(b). *See Marshall* v. *Hartford Fire Insurance Co., supra* and cases cited therein.

The Court is of the opinion, however, that this defect was cured by the subsequent extensive conciliation undertaken by the parties. The defendants concede that the parties' post-complaint efforts would have been sufficient to satisfy the statute if they had occurred prior to the filing of the complaint. They argue that the Department's failure to engage in this conciliation *prior* to the filing of the complaint deprives this Court of jurisdiction.

There is a split of authority on the question of whether Section 7(b) is jurisdictional. *Compare Usery* v. *Sun Oil Co. (Delaware)*, 423 F.Supp. 125 (N.D.Tex.1976); *Dunlop* v. *Resource Sciences Corp.*, 410 F.Supp. 836 (N.D.Okl.1976) (holding requirement is jurisdictional) *with Brennan* v. *Ace Hardware Corp.*, 495 F.2d 368 (8th Cir. 1974) (dictum); *Brennan* v. *Texas Instruments, Inc.*, 12 FEP Cases 1724 (E.D.Ky. 1976); *Dunlop* v. *Sandia Corp.*, 13 FEP Cases 128 (D.N.M.1975) (staying actions). Indeed, one case which held that the requirement was jurisdictional (*Usery* v. *Sun Oil Corp., supra*), cited as support a case which states that a district court has the discretion to stay an action while the parties attempt conciliation (*Brennan* v. *Ace Hardware Corp., supra*).

This Court believes that the more preferable approach is to stay the action while conciliation is attempted. This approach prevents the harsh consequences of dismissal and yet allows the parties to engage in statutorily mandated conciliation. Moreover, it finds support in Section 7(b) itself which provides in pertinent part that

> The court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter . . . .

The Court consequently finds that it has equitable power to stay the action in order to provide an opportunity for conciliation to take place.

Defendants' only argument in contravention of this holding is that it "excuse[s] gross inadequacies by the Department in fulfilling its statutory mandate" and therefore encourages the Department not to comply with a mandatory prerequisite to filing suit. The Court does not believe that it is faced with that situation here. It is true that the Department's representatives were overly heavy-handed in the conciliation attempts and that their attempts were not sufficiently comprehensive. However, this is not a case where the Department filed suit without making any attempts to conciliate at all. The Court cannot acquiesce in defendants' characterization of the conciliation efforts as "grossly inadequate." The Court is confident that the Department in the future will attempt more fully to conciliate alleged violations. Moreover, since extensive conciliation has been achieved in this case through informal bargaining by both sides, it is clear that the spirit of the statute has not been violated. For all of these reasons, this Court finds that it has jurisdiction over the case and properly stayed the action in November 1974.

II. *Scope of the Complaint*

The Department's complaint reads in pertinent part:

IV.

> Defendants, employers subject to the provisions of Section 4(a) of the Age Discrimination in Employment Act, have, since on or about January 1, 1971, willfully violated and are violating the provisions of Section 4(a)(1) of the said Act and Section 15 of the Fair Labor Standards Act, by discharging, refusing to hire, demoting, and/or otherwise discriminating against in excess of 300 employees at numerous locations and places of business of the defendants in at least four different states, because such individuals were between the ages of 40 and 65.
>
> * * * *
>
> WHEREFORE, cause having been shown, plaintiff prays for judgment . . . setting aside the amendment to the pension requiring retirement at age 62; and for such other damages as a result of the willful nature of the violations, and for costs of this action.

Defendants advance two arguments that allegedly prevent the Deparment from challenging the legality of defendants' reduction of the mandatory retirement age:

(1) that the total lack of conciliation as to this issue mandates dismissal under Section 7(b) of the Act; and (2) that "the complaint does not comprehend these additional claims." These contentions may be quickly dealt with.

Since this Court has already held that it has discretionary power to order a stay to allow both sides to effect conciliation, contention (1) is without merit. It is likewise clear that contention (2) is meritless. The portions of the complaint quoted above satisfactorily put

defendants on notice that the Department was putting the retirement age reduction at issue. Rule 8, Fed.R. Civ.P.

The Court is unaware of the details of the extensive and comprehensive discussions between counsel. Thus, the Court cannot with certainty determine whether the Department will allege that other violations of the Act are encompassed by its somewhat broad complaint. However, this Court will not find that any acts subsequent to the 1974 complaint are covered, unless the Department can show some nexus between the alleged post-complaint violations and the actions which led to the filing of this complaint. Consequently, the Court finds that employees affected by the reduction of the mandatory retirement age are included with the purview of this complaint, at least insofar as they contest the companies' authority to retire them at age 62 without their consent.

III. *Whether the Companies' Involuntary Retirement of 142 Employees Violated Section 4(a)*

Section 4(a) of the Act, 29 U.S.C. § 623(a)(1) provides that

> It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

Defendants assert that the legislative history of the ADEA shows that Congress only intended to prohibit "arbitrary, unreasonable decisions based on age." However persuasive this argument may be, it is a settled canon of statutory interpretation that courts will resort to legislative history only when confronted by am-

biguous legislation. It cannot be said that the above statute is ambiguous, hence this Court must attempt to enforce the literal language embodied within it.

Defendants next contend that plaintiff must "show more than simply the fact that he was within the protected age group and that he was adversely affected by an employment decision." *Citing Bishop* v. *Jelleff Associates*, 398 F.Supp. 579, 593 (D.D.C. 1974). Defendants concede, however, that recent decisions in the Fifth Circuit have adopted a more liberal standard for establishing a prima facie case. *See Price* v. *Maryland Casulty Co.*, 561 F.2d 609, 612 (5th Cir. 1977); *Marshall* v. *Goodyear Tire & Rubber Co.*, 554 F.2d 730 (5th Cir. 1977). For example, in *Wilson* v. *Sealtest Foods Division of KraftCo. Corp.*, 501 F.2d 84 (5th Cir. 1974) the court held that a showing that an employee was within the protected age group (age 40-65, 29 U.S.C. § 631), was asked to take early retirement against his will, and was replaced by a younger person was enough to establish a prima facie case. Similarly, in *Laugesen* v. *Anaconda Co.*, 510 F.2d 307 (6th Cir. 1975), the Court held that, if one of the factors which caused the decision to terminate an employee was age bias, a prima facie case had been presented.

Defendants argue that *Price* v. *Maryland Casualty Co.*, *supra* establishes that a prima facie case is made out where a plaintiff proves: (1) that he was a member of the protected group; (2) that he was discharged; (3) that he was replaced with a person outside the protected group; and (4) that he was qualified to do the job. Defendants contend that the third criterion of the above test is missing in this case since most of the employees were replaced by employees who were younger but still in the protected group. The Court does not find this to be a very compelling argument. Accepting this test literally would prevent even blatant and willful violations of the

Act by an employer as long as he had a replacement employee who was over 40. Accordingly, this Court will not adopt defendants' contention but will find that the Department has established a prima facie case.

The Court notes that defendants have included in their argument that the Department did not meet its burden, arguments which relate to a Section 4(f)(1) defense. Section 4(f)(1) of the Act provides in pertinent part:

> It shall not be unlawful for an employer, employment agency, or labor organization—
>
> > (1) to take any action otherwise probitited . . . where the differentiation is based on reasonable factors other than age. 29 U.S.C. § 623 (f)(1).

The Court is of the opinion that this section represents an affirmative defense which defendant has the burden of proving. In *Arritt* v. *Grisel*, 567 F.2d 1267 (4th Cir. 1977), the Fourth Circuit held that the employer has the burden of proving a Section 4(f)(1) defense. Although Judge Thomsen's opinion was concerned with another section of 4(f)(1) (the bona fide occupational qualification defense), the principle that the Court gleans from this case is that the defenses set forth in Section 4(f) are separate from 4(a). Consequently, consideration of whether the Department has met its burden under 4(a) does not involve 4(f)(1). *Cf. Arritt* v. *Grisell, supra; McMann* v. *United Air Lines, Inc.*, 542 F.2d 217, 219 n. 3 (4th Cir. 1976), *rev'd on other grounds* 434 U.S. 192, 98 S.Ct. 444, 54 L.Ed. 2d 402 (1977), *But see Price* v. *Maryland Casualty Co., supra.*

In any event, the availability of the 4(f)(1) defense is inextricably bound up in the more important question of whether the defendants have shown a 4(f)(2) defense since both depend upon the question of pension entitlement. Accordingly, the Court will deal with this issue, *infra.*

IV. *Whether the Companies' Involuntary Retirement of 142 Employees Is Exempt Under Section 4(f)*

Section 4(f)(2) of the Act, 29 U.S.C. § 623(f)(2) provides in pertinent part:

> It shall not be unlawful for an employer . . .
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual.

Both sides agree that there are three elements to this exemption, which is available when an employer:

(1) observes the terms

(2) of a bona fide retirement plan

(3) that is not a subterfuge to evade the purposes of the Act.

The Supreme Court has interpreted Section 4(f)(2) in *United Air Lines, Inc.* v. *McMann*, 434 U.S. 192, 98 S.Ct. 444, 54 L.Ed2d 402 (1977). In that case the issue before the Court was whether defendant's forced retirement of plaintiff at age 60 pursuant to its pension plan was exempted from the ADEA by Section 4(f)(2). The High Court held that the plan was not a "subterfuge" since it had existed prior to the enactment of the ADEA. The Court concluded that the exemption was available to United since it had observed the terms of a concededly bona fide pension plan. This Court will therefore examine the above elements in light of *McMann*.

A. *"Observing the Terms"*

The Department argues that defendants did not observe the terms of their plan in terminating these employees since the plans did not expressly set forth defendants' right to do so. Defendants counter, and the Department does not dispute, that they have always had the inherent right to terminate any employee for any legitimate reason. They argue that should the Department's position be accepted, one of two absurd results would follow. First, between the ages of 60 and 65 an employee would be guaranteed employment if he chose not to retire. The other possible interpretation, defendants argue, is that an employee terminated between 60 and 65 would be ineligible for benefits under the plan.

This Court does not find the Department's position tenable in light of *Marshall* v. *Hawaiian Telephone Co.*, 575 F.2d 763 (9th Cir. 1978). In that case, decided after *McMann*, the Department argued that the employer did not observe the terms of a plan when it retired several employees because of their age. The plan permitted, but did not require, the employer to retire employees at age 60.

The Ninth Circuit stated:

> The Secretary contends that the section 4(f)(2) exception for employers acting "to observe the terms of" a plan does not apply unless the plan *requires* retirement at a certain age. According to the Secretary, forced retirements solely at the employer's option, though permitted by the plan, do not qualify for the exception.
>
> The Secretary reasons that an employer "observes" the terms of a plan only where the employer is *forced* by its terms to retire an employee. Where an employer *chooses* to retire an employee, accord-

ing to the argument, the employer is not passively "observing" the plan.

After careful consideration, we reject the Secretary's position that an employer does not "observe the terms of" a plan by exercising the option permitted by a plan to force retirement on an employee.

. . . . .

We choose to join the *Zinger* [*Zinger* v. *Blanchette*, 549 F.2d 901 (3d Cir. 1977)] court in reading the language of Section 4(f)(2) as permitting an employer to exercise the option of retiring employees pursuant to a bona fide retirement plan even where the plan does not require such retirements. *Marshall* v. *Hawaiian Telephone Co.*, *supra* at 766-67 (citations and footnotes omitted, emphasis in original).

This position is in accord with *Zinger* v. *Blanchette*, 549 F.2d 901 (3d Cir. 1977), *cert. denied*, 434 U.S. 1008, 98 S.Ct. 717, 54 L.Ed.2d 750 (1978). That case, cited favorably by the Supreme Court in *McMann*, pointed out that there is a measurable difference between terminations where substantial benefits are paid and outright discharges. The court noted that:

> The primary purpose of the Act is to prevent age discrimination in hiring and discharging workers. There is, however, a clear, measurable difference between outright discharge and retirement, a distinction that cannot be overlooked in analyzing the Act. While discharge without compensation is obviously undesirable, retirement on an adequate pension is generally regarded with favor. *Id.* at 905 (footnotes omitted).

There is no question that defendants have had the power, exercised over the years, to involuntarily retire employees. Accordingly, this Court concludes that de-

fendants "observed the terms" of the benefits plan when they involuntarily retired their employees while providing them with their pension benefits.

B. *"Bona Fide Pension Plan"*

This element may be quickly disposed of. It seems fairly clear that a plan which exists and pays substantial benefits is bona fide. *Brennan* v. *Taft Broadcasting Co.*, 500 F.2d 212 (5th Cir. 1974). *See United Air Lines, Inc.* v. *McMann*, 434 U.S. 192, 98 S.Ct. 444, 446, 54 L.Ed.2d 402 (1977). There is no dispute that defendants' plans have existed for over 25 years and have paid substantial benefits to retired employees. This Court concludes that the plans are bona fide.

C. *"Subterfuge"*

In *McMann*, the Supreme Court stated that:

> In ordinary parlance, and in dictionary definitions as well, a subterfuge is a scheme, plan, stratagem or artifice of evasion. In the context of this statute, "subterfuge" must be given its ordinary meaning and we must assume Congress intended it in that sense. So read, a plan established in 1941, if bona fide, as is conceded here, cannot be a subterfuge to evade an Act passed 26 years later. *United Air Lines, Inc.* v. *McMann*, 434 U.S. at 203, 98 S.Ct. at 450.

A plan enacted prior to the Act cannot therefore be a subterfuge to evade it. Since the Department concedes, as it must, that both the C & O and B & O pension plans were in existence long before the promulgation of the ADEA, it appears to this Court that the plans cannot be a subterfuge to evade the purposes of the Act.

The Department's only argument is that the post-Act amendments to the plan modified it in such a way that it became a subterfuge. This position is untenable. With the exception of the reduction in the mandatory retirement age (which will be dealt with *infra*), the amendments to the plan infringed no substantive rights of the employees but liberalized and increased the benefits available under the plan. Thus, it is impossible for this Court to see how these pre-Act pension plans could be considered "subterfuges" under the *McMann* decision.

Since defendants have satisfied the three elements of Section 4(f)(2), it appears to this Court that their termination of 142 employees was exempted by the provisions of the Act itself. Only two other matters need to be briefly noted in this regard.

The Department has argued that *McMann* and *Zinger* should not be expanded since Congress has enacted amendments to the ADEA. *See* Pub.L. No. 95-256, § 2(a), 92 Stat. 189. The Department cites legislative history of this amendment for the proposition that "the *McMann* decision, insofar as it imputed to Congress an intent to permit involuntary retirement because of age under some plans, was incorrect." Plaintiff's Post Trial Brief on The Issues of "Pension Entitlement" and the "Reduction in the Mandatory Retirement Age," at 23.

This contention is exactly one of the arguments made by the dissent in *McMann*. *See McMann* at 218-19 (Marshall, J., dissenting). The argument was expressly repudiated by Chief Justice Burger for the majority when he stated that "Legislative observations 10 years after passage of the Act are in no sense part of the legislative history." *McMann* at 200 n. 7. Since this argument has already been disposed of by the Supreme Court, this Court need not trouble itself with it.

Finally, both sides spent some time arguing over the availability of a 4(f)(1) defense in this situation. It seems to this Court that it is clear that defendants had an overriding business necessity to reduce their work force. They responded to this business necessity by terminating many employees, some of them based upon the criterion of pension entitlement. Defendants argue that "pension entitlement" was a "differentiation based on reasonable factors other than age" within 4(f)(1), while the Department argues that it is merely a method for terminating older workers.

After careful consideration, this Court believes that the question of whether pension entitlement is a "differentiation based on reasonable factors other than age" cannot be distinguished in this case from the availability of a 4(f)(2) defense. Surely if Congress intended for 4(f)(1) to cover the instant situation, there would be no need to specifically exempt pension plans from the ADEA pursuant to Section 4(f)(2). The Court concludes that the question of whether the employer's actions were reasonable is governed by the availability of the 4(f)(2) defense. Therefore, although the Court agrees with defendants that (1) they had a clear business necessity to reduce their forces and (2) other methods of reduction (i.e. relative performances etc.) were infeasible, the Court finds that the reasonableness of the use of pension entitlement must be governed by 4(f)(2).

Since defendants did have a denite business necessity to reduce their work force, this Court finds that they could reasonably take advantage of Section 4(f)(2) by retiring workers pursuant to their pension plan.

V. *Whether the Reduction of the Mandatory Retirement Age Violated Section 4(a)*

In Section III above, the Court outlined its analysis of the Department's burden in ADEA cases. It seems clear that the Department's showing that defendants amended their pension plans to require employees to retire at age 62 establishes a prima facie case of age discrimination. The important question again is whether defendants qualify for a 4(f)(2) defense.

VI. *Whether the Reduction of the Retirement Age Was Exempt Under Section 4(f)(2)*

The three elements of a Section 4(f)(2) defense were discussed in Section IV of this opinion. The Court will apply the facts surrounding the amendment to the pension plan to these elements.

It is clear that in retiring their employees mandatorily at age 62 defendants have been "observing the terms" of the plan. Indeed, even the Department concedes that a mandatory provision in a plan satisfies this requirement. This element has been complied with. *United Air Lines, Inc.* v. *McMann, supra; Marshall* v. *Hawaiian Telephone Co., supra.* It is also clear that the plan is "bona fide," since it exists and pays benefits. *Brennan* v. *Taft Broadcasting Co., supra.* The first two elements have been satisfied.

The only element which creates any room for reasonable argument is the "subterfuge" component. The pension plans were both created more than 25 years ago. However, in 1972, defendants enacted amendments which lowered the mandatory retirement age from 65 to 62. The Department argues that these post-Act amendments were a subterfuge to avoid the Act.

Analytically, the Department's argument is fairly simple. It contends that the purpose and effect of the 1972 amendments was to reduce the defendants' work force at the particular expense of older workers. This purpose, the Department argues, is clearly prohibited by the letter and spirit of the Age Discrimination Act. Therefore, the enactment of the 1972 amendments caused the plan to be used as a "subterfuge to evade the purposes of" the Act.

Although this argument has some appeal, it is without merit. The logical conclusion of the Department's arguments is that any attempt by an employer to avail himself of the requirements of Section 4(f)(2) necessarily renders his plan a "subterfuge." The Court cannot find any justification for such a result from the statute, its legislative history, or the case law construing it. The Court believes that the correct distinction was drawn by the Third Circuit in *Zinger* v. *Blanchette*, *supra*, which held that a plan which provided substantial retirement benefits could not be considered a subterfuge.

Finally, it is clear that defendants have always had the power to involuntarily retire their employees under the consistent application of their plans. It seems to this Court that the mere codification of this power in 1972 could not operate to somehow convert these pre-Act plans into Post-Act "subterfuge." The Court concludes that a 4(f)(2) defense is available to the railroad companies.

VII. *The Portal-to-Portal Act*

Section 7(e) of the ADEA, 29 U.S.C. § 626(e), incorporates Section 10 of the Portal-to-Portal Act, 29 U.S.C. § 259. Section 10 provides in pertinent part:

> [N]o employer shall be subject to any liability or punishment . . . if he pleads and proves that the act or omission complained of was in good faith in con-

> formity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of [an] agency of the United States . . . or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

Defendants have properly pled Section 10 as a defense to the Department's complaint and have introduced various opinion letters and an interpretive bulletin as the basis for this defense. It is undisputed that the interpretations were issued by the Wage and Hour Division of the Department of Labor and are the proper subject for reliance if relevant. The publications were all concerned with Section 4(f)(2). Relevant portions are excerpted below.

> [T]he Act authorized involuntary retirement irrespective of age, provided that such retirement is pursuant to the terms of a retirement or pension plan meeting the requirements of Section 4(f)(2). 29 C.F.R. § 860.110 (First published Aug. 30, 1968). The lowering of the retirement age from 65 to 62 years for employees participating in a bona fide retirement plan would not affect the applicability of provisions authorizing retirement irrespective of age pursuant to retirement or pension plans, provided such plans are not a subterfuge to evade the purposes of the Act. The statutory exception would not apply to the involuntary retirement before age 65 of employees who are not participants in a retirement plan. Opinion Letter of Wage-Hour Administrator, September 6, 1968.

> [T]he term "bona fide" given its generally understood meaning, describes a plan established in good faith to provide certain fringe benefits for employees, and not as a device or subterfuge to avoid the purposes of the Act. Opinion Letter of Wage-Hour Administrator, June 29, 1971.

These documents, and others, were reviewed by defendants' officers prior to taking the two actions involved in this complaint. The Court will therefore examine these two actions to determine whether defendants acted in good faith and in conformance with the publications.

A. *The 1971 Force Reduction*

The Department does not appear to dispute the fact that defendants subjectively relied on its publications, but instead contends that the standard is an objective test and that defendants' actions do not satisfy that test.

This Court, however, has determined that it was lawful and reasonable for defendants to terminate the 142 employees since they were entitled to the 4(f)(2) exemption from the Act. Accordingly, it would seem apparent that defendants could rely on interpretations which appear to support their position. Indeed, the Third Circuit adopted a position quite similar to defendants in *Zinger* v. *Blanchette, supra,* when it interpreted Section 860.110. The Court concludes that defendants could and did reasonably rely on these publications and therefore have presented a meritorious defense under Section 10 of the Portal-to-Portal Act.

B. *The 1972 Amendments*

Defendants' position is even stronger in regard to the 1972 amendments. The September 6, 1968 opinion letter specifically sanctioned lowering the mandatory retirement age in a benefit plan from 65 to 62. This is exactly what

defendants did. Moreover, the Court cannot accept the Department's argument that the filing of suit by the Department removed defendants' rights to rely on this document. Section 10 provides that an interpretation is no longer a proper subject for reliance if (1) it is rescinded or modified, or (2) it is determined by judicial authority to be of no effect. This opinion letter has never been withdrawn by the Department, despite its present arguments. Moreover, this Court believes that the Department's former position, rather than its present position in this litigation, was the correct one. Consequently, the Court finds that defendants have pled and proven a valid defense under Section 10.

VIII. *Conclusion*

For the reasons stated in this opinion, the Court finds:

(1) that the Department did not satisfy the conciliation requirement of the Act. This failure, however, was cured by the subsequent conciliation achieved after a stay issued by this Court;

(2) the scope of the Department's complaint includes individuals terminated because of defendants' 1972 amendments, but all other individuals must show a sufficient nexus to pre-complaint violations;

(3) the Department met its burden of proving a violation of Section 4(a) in regard to the 1971 force reduction;

(4) defendants' actions in terminating 142 individuals in the 1971 force reduction are exempted from the Act by virtue of Section 4(f)(2);

(5) the Department met its burden of proving a violation of Section 4(a) in regard to the 1972 amendments to the plan;

(6) the 1972 amendments are exempted from the Act by virtue of Section 4(f)(2); and

(7) defendants have pled and proven exemption from liability pursuant to Section 10 of the Portal-to-Portal Act.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil Action No. N-74-637

UNITED STATES DEPARTMENT OF LABOR
RAY MARSHALL, SECRETARY OF LABOR

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY and
THE CHESAPEAKE AND OHIO RAILWAY COMPANY

Filed: December 5th, 1978.

Northrop, Chief Judge.

This action was filed on behalf of the Secretary of Labor on June 19, 1974. In the complaint, the Department of Labor [hereinafter Department] charged the Baltimore and Ohio Railroad Company [B & O] and the Chesapeake and Ohio Railway Company [C & O] with violating section 4 of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (1976) [hereinafter the Act or ADEA]. Trial was held on six separate issues on April 27, 28 and May 17-25, 1978. Counsel for both plaintiff and defendants submitted exhaustive pretrial and post-trial memoranda. At trial and through these memoranda, the parties litigated, among other issues, the question of whether the actions of the defendants in terminating 142 individuals in their 1971 force reduction are exempted from the Act by virtue of section 4(f)(2), 29 U.S.C. § 623(f)(2) (1976).

On September 6, 1978, this Court issued an opinion in which it found that the termination of the 142 individuals pursuant to a bona fide employee benefits plan enacted prior to 1967 is exempt under section 4(f)(2) of

the Act. In resolving this issue, the Court relied upon the Supreme Court's interpretation of section 4(f)(2) in *United Air Lines, Inc.* v. *McMann*, 434 U.S. 192, 98 S.Ct. 444, 54 L.Ed.2d 402 (1977).[1] In *McMann*, the Supreme Court examined the statutory language and legislative history of section 4(f)(2) and found nothing to indicate that Congress intended to invalidate retirement plans instituted in good faith prior to the enactment of the Age Discrimination in Employment Act of 1967. *Id.* at 203, 98 S.Ct. 444. Therefore, the Supreme Court concluded that section 4(f)(2) "[was] intended to permit observance of the mandatory retirement terms of bona fide retirement plans, but that the existence of such plans could not be used as an excuse not to hire any person because of age." *Id.* at 202, 98 S.Ct. at 449. That statutory interpretation served as support for this Court's determination, in this case, that the defendants' 1971 force reduction satisfied the requirements of section 4(f)(2) and thereby avoided violation of other provisions of the Act.

When the Supreme Court decided the *McMann* case in December 1977, it was cognizant of the fact that Congress had several amendments to the ADEA before it. One of these amendments was to "clarify" the meaning of section 4(f)(2) to preclude the exemption of the mandatory retirement of employees pursuant to bona fide retirement plans for the Act's requirements. Although this pending amendment presented a contrary interpretation of section 4(f)(2), the Supreme Court found that it had to limit its review to the statutory

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[1] The divided opinions of several United States Courts of Appeals had motivated the Court to grant certiorari on this issue. 434 U.S. at 193, 98 S.Ct. 444; *see Zinger* v. *Blanchette*, 549 F.2d 901 (3d Cir. 1977), *cert. denied*, 434 U.S. 1008, 98 S.Ct. 717, 54 L.Ed.2d 750 (1978); *McMann* v. *United Air Lines, Inc.*, 542 F.2d 217 (4th Cir. 1976); *Brennan* v. *Taft Broadcasting Co.*, 500 F.2d 212 (5th Cir. 1974).

language and legislative history of the 1967 Act and could not consider "[l]egislative observations [made] 10 years after passage of the Act . . ." *Id.* at 200 n.7, 98 S.Ct. at 449.

On April 6, 1978, several months after release of the *McMann* decision and several weeks prior to trial in this case, Congress enacted the amendment to section 4(f)(2), Pub.L. No. 95-256, 92 Stat. 189 (1978), to clarify that:

> [t]he purpose of this exception was to facilitate the hiring of older employees by permitting their employment without necessarily providing equal benefits under employee benefits plans.

S. Rep. No. 493, 95th Cong., 2d Sess. 9, *reprinted in* [1978] U.S.Code Cong. & Ad. News pp. 976,984. The House Conference Report on the amendment addressed the *McMann* decision and stated that the conferees specifically disagreed with the holding and reasoning in that case. H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 8, *reprinted in* [1978] U.S.Code Cong. & Ad. News pp. 1000, 1001.

The Department has moved this Court to partially reconsider its September 6, 1978 opinion in light of this amendment. The Secretary argues that the amendment merely clarifies the original purpose of section 4(f)(2) as enacted in 1967 and that, since the amendment became law prior to trial in this case, the Court must apply the new interpretation of section 4(f)(2) to the defendants' termination of 142 individuals. Under the 1978 amendment's interpretation of section 4(f)(2), the Secretary correctly contends that the defendants' actions in terminating 142 employees in their 1971 force reduction are not exempted from the requirements of the Act. For the Court to reach that conclusion, however, the Secretary must show that the amendment should apply retroactively to the defendants' conduct.

To support its argument that the 1978 amendment should govern this action, the Department cites the general principle set forth in *Bradley* v. *School Board*, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed. 2d 476 (1974):

> a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.

Id. at 711, 94 S.Ct. at 2016. The Department contends that the legislative history of the amendment clearly establishes a Congressional intent to clarify, rather than alter, the meaning of section 4(f)(2) as enacted in 1967 and to apply the clarified interpretation of the section retroactively to actions that arose prior to April 6, 1978. The Secretary also argues strenuously that no manifest injustice would occur through retroactive application since age discrimination is an issue of "great national concern" that the defendants did not have a right to engage in. Furthermore, the Secretary asserts that the defendants should have been aware of the possibility that their interpretation of section 4(f)(2) would not become the settled law. Therefore, the Secretary concludes, the 1978 amendment to section 4(f)(2) should be applied to this action to invalidate the defendants' mandatory retirement of 142 individuals in 1971.

In response, the defendants point out that the Secretary, at trial, raised the same interpretation of section 4(f)(2) as he does now but without submitting the 1978 amendment as support for his position. In its September 6, 1978 opinion, the Court rejected that interpretation and found that the companies specifically considered, relied on, and acted in conformity with section 4(f)(2) and the Department of Labor's official interpretation thereof. The defendants believe that the Court's prior ruling on section 4(f)(2) is sufficient grounds for denial of this motion. However, if the applicability of the 1978

amendment must be considered, the defendants contend that Congress must make its intent clear when it retroactively affects substantive rights.

Here, defendants argue, Congress intended the new legislation concerning section 4(f)(2) to have prospective effect only. This intent, they assert, comports with the settled rule that legislation affecting substantive rights is presumed to operate prospectively only. Under a contrary rule, they maintain, "private parties would literally be unable to comply with the law." *See Defendants' Opposition to Plaintiff's Motion for Partial Reconsideration* at 9 filed November 1, 1978. They conclude that such a state of affairs would lead not only to manifest injustice for a party that reasonably relied on prior settled law, but also to a violation of that party's right to due process. Based on this reasoning, the defendants request the Court to stand on its September 6, 1978 ruling.

This Court approaches the Plaintiff's Motion for Partial Reconsideration with great concern. The intent that the Secretary of Labor attempts to ascribe to Congress in its enactment of the 1978 amendment to section 4(f)(2) has serious implications for the ability of private parties to conduct their activities in accordance with law. This Court refuses to accept the legislative intent asserted by the Secretary of Labor without a showing that Congress carefully considered the impact of the change in the law on the prior conduct of private individuals and businesses and clearly stated its intent to rearrange previous economic relationships.

The language of § 4(f)(2), as enacted in 1967, was susceptible of two interpretations. *See United Air Lines, Inc.* v. *McMann, supra,* 434 U.S. at 209, 98 S.Ct. 444 (Marshall, J., dissenting). The then Wage and Hour Administrator of the Department of Labor issued an interpretive bulletin in 1968 setting forth his opinion that

section 4(f)(2) should be read to exclude mandatory retirements pursuant to bona fide employee benefit or retirement plans enacted prior to 1967. *See* 29 C.F.R. § 860.110 (first published Aug. 30, 1968); *Marshall* v. *B & O and C & O*, Opinion, Sept. 6, 1978 at 7-8314-2-8315-1. The defendants, faced with economic hardship and the need to reorganize their business operations in the early 1970's, considered and relied upon the Secretary's interpretive bulletin as well as the Act itself, in choosing to require the early retirement of 142 employees in 1971 in accordance with the terms of their employee benefits plan. Thereafter, several United States Courts of Appeals addressed the issue of the proper interpretation of section 4(f)(2) and reached divergent conclusions. *See Zinger* v. *Blanchette, supra; Brennan* v. *Taft Broadcasting Co., supra.* Because of that conflict, the Supreme Court heard *United Air Lines, Inc.* v. *McMann, supra,* and determined, from reading the language and legislative history of section 4(f)(2), that mandatory retirements pursuant to bona fide benefit or retirement plans fall under the exemption and therefore do not violate other sections of the ADEA. This reading concurred with the defendants' interpretation of section 4(f)(2) in 1971 and served as the foundation for this Court's opinion in September 1978 that B & O and C & O did not violate the ADEA by retiring 142 employees during their force reduction.

The amendment, which the plaintiff wishes the Court to apply in this case, first surfaced in Congress after the Courts of Appeals split in their interpretation of section 4(f)(2) and just prior to the Supreme Court's decision in *McMann.* Congress enacted the amendment as part of a package of amendments to the ADEA on April 6, 1978. This Court finds it difficult to believe that Congress would apply that amendment retroactively to activity undertaken prior to 1978 without a careful consideration of the extensive litigation over the meaning of sec-

tion 4(f)(2) and the justifiable reliance of many private businesses on what appears to have been the dominant interpretation of that section until the 1978 amendment clarified congressional intent. For that reason, the Court will scrutinize the legislative history of the 1978 amendments carefully to determine whether the retroactive intent asserted by the Secretary of Labor is clear and unambiguous.

The legislative history of the 1978 amendments to the ADEA states that the original purpose of section 4(f)(2) was to ease the difficulty of hiring older employees by relaxing the necessity for equal benefits for these workers under employee benefit plans. *See* S. Rep. No. 493, *supra*. The Joint Explanatory Statement of the Committee of Conference, in declaring that § 4(f)(2) prohibits the mandatory retirement of an employee within the protected age group pursuant to a bona fide employee benefits plan, makes clear that the interpretation of section 4(f)(2) adopted by the former Wage and Hour Administrator in his intepretive bulletin, the defendants in their 1971 force reduction, the Supreme Court in *McMann*, and this Court in the September 6, 1978 opinion no longer controls the question of mandatory retirement. Instead, the Joint Explanatory Statement announces that:

> The conferees specifically disagree with the Supreme Court's holding and reasoning in [McMann]. Plant provision in effect prior to the date of enactment are not exempt under Section 4(f)(2) by virtue of the fact that they antedate the act or these amendments.

H.R. Con. Rep. 950, *supra* at 8, U.S. Code Cong. & Ad. News at 1001.

While these legislative observations clearly set forth the congressional intent to clarify the original meaning of section 4(f)(2), they do not touch upon the issue of whether the clarified intent should be applied retroac-

tively. The plaintiff appears to rely on the clarifying purpose of § 4(f)(2) as the foundation for his argument that Congress intended the amendment to have retroactive effect. *See Plaintiff's Memorandum of Law in Support of Motion for Partial Reconsideration*, pages 8 and 9, filed October 13, 1978.[2] The Secretary does not present any legislative statements that refer to the retroactive effect of the amendment. The defendants, however, have brought to the Court's attention several legislative observations that do address that issue. *See 123*, Cong. Rec. S17304 (daily ed. Oct. 19, 1977); 124 Cong.Rec. S4449 (daily ed. March 23, 1978). In inspecting this aspect of the legislative history, the Court is convinced that Congress intended the 1978 amendment to section 4(f)(2) to have prospective effect only.

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[2] The plaintiff also cites *Davis* v. *Boy Scouts of America*, 457 F.Supp. 665 (D.N.J. 1978), as support for his position. In *Davis*, the court held that the 1978 amendment applied to a pre-existing controversy. The district judge found that Congress in passing the amendment meant to reverse decisions interpreting the ADEA, so as to allow involuntary or mandatory retirement on the basis of a "bona fide" pension plan. *Id.* at 673. Although he initially felt that the plaintiff sought a retroactive application of the amendment, the district judge concluded the plaintiff actually was requesting the court to apply the law which is currently in effect at the time of the decision. *Id.* Relying heavily on the congressional intent to clarify the law, the court found that the amendment controlled the disposition of the case under *Bradley* v. *School Board*, *supra*. *Id.* at 673.

This Court does not find *Davis* dispositive of the issue in this case. The *Davis* court does not address directly the timing issue but, as does the plaintiff in this case, infers from the congressional intent to clarify the law that the legislature meant the amendment to have both a prospective and retrospective effect. Without an adequate discussion of the legislative history of the 1978 amendments to the ADEA on this point, the Court does not find that inference to be persuasive support for the conclusion that the *Bradley* principle should be applied in this case.

In a colloquy with Senator Williams, the floor and conference manager for the 1978 amendments to the ADEA, Senator Randolph specifically asked whether the amended Act would have a retroactive effect on mandatory retirements previously exempted by § 4(f)(2):

> I should like to ask the Senator from New Jersey (Mr. Williams) whether this bill retroactively covers a forced retirement at say age 60 or 62 prior to the effective date of this bill where the individual so retired is eligible for, and actually receives a pension under a pension plan which has been qualified with the Internal Revenue Service.
>
> [Senator Williams responded:]
>
> The bill is not retroactive. The question of mandatory retirements prior to the effective date of this bill will be determined by the courts' interpretation of existing law.

123 Cong.Rec. S17304 (daily ed. Oct. 19, 1977).

Beyond this specific reference to retroactivity, the entire legislative history evinces an entirely different motivation behind the enactment of the 1978 amendments than that pressed upon this Court by the Secretary of Labor. Rather than mere clarification of original purpose, the drafters and managers of the 1978 legislation intended it to reflect the "more comprehensive understanding about the desires and abilities of older persons" gained by social scientists and legislators since the enactment of the ADEA in 1967. 124 Cong.Rec. S4449 (daily ed. March 23, 1978). Consistent with that overall purpose, the amendments were drafted to "insure that the act (ADEA) provides a full measure of meaningful protections for older workers." *Id.* As one of those measures, the mandatory retirement age was raised from 65 to 70. The amendment to section 4(f)(2), while intended to clarify the original purpose of the section, was also

passed to insure that other parts of the 1978 amendments, such as the increase in the mandatory retirement age, would retain their full force under the amended act. The interrelationship between section 4(f)(2) and other amended sections is clearly set forth by Senator Williams:

> The conference agreement also clarifies the existing law to insure that pension plans or seniority systems which require mandatory retirement may no longer be applied to employees covered by the Act. . . . [r]aising the act's upper age limit would be meaningless if the Court's interpretation of §4(f)(2) was allowed to stand. The conference agreement assures that this loophole in the present law will be closed.

Id. The Court interprets this statement to suggest strongly that section 4(f)(2) should not be severed from other amended sections and that Congress intended the entire legislative package represented by the 1978 amendments to the ADEA to have prospective effect only.[3]

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[3] The defendants have stressed the "may no longer be applied" language in Senator Williams' remarks as support for their position that Congress intended the amendment to apply prospectively. The Court agrees with the defendants and finds that that reference, when combined with the prior statement of Senator Williams on the question of retroactivity, presents a consistent indication of the intent of the floor and conference manager of the legislation to have the amendment apply to future acts only.

The Court also observes that other statements in the legislative history provide further support for a finding of a prospective effect. In a discussion with Senator Javits, Senator Percy expressed his grave reluctance in voting for the amendments:

> . . . I have never voted on a bill which I have more reservations and questions about than this bill . . . I have serious reservations, because I wonder whether we really know all of the ramifications of what we are doing today.

123 Cong. Rec. S17304 (daily ed. Oct. 19, 1977). Senator Javits replied that supporters of the bill had taken certain precautions, such as the deferral of the effective date of some sections of the

The Court's reading of the legislative history of the 1978 amendments is consistent with the general rules of statutory interpretation. Amendatory statutes, especially those that reflect a change in knowledge or societal attitudes, should operate prospectively only. *See Hospital Employees Labor Program* v. *Ridgeway Hospital*, 570 F.2d 167, 169-70 (7th Cir. 1978). Unlike other statutes that courts have construed to apply to pre-existing events or actions, *see Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976) (Coal Mine Health and Safety Act of 1969); *Gates* v. *Collier*, 559 F.2d 241 (5th Cir. 1977) (Civil Rights Attorney's Fees Awards Act); *White* v. *Estelle*, 556 F.2d 1366 (5th Cir. 1977) (Federal Magistrates Act), the 1978 amendments are not accompanied by a strong indication of legislative intent to apply them retroactively. *See Greene* v. *United States*, 376 U.S. 149, 84 S.Ct. 615, 11 L.Ed.2d 576 (1964); *Hospital Employees Labor Program* v. *Ridgeway Hospital, supra; NLRB* v. *St. Luke's Hospital Center*, 551 F.2d 476 (2d Cir. 1976); *Weise* v. *Syracuse University*, 522 F.2d 397 (2d Cir. 1975). Therefore, the Court concludes, on the basis of legislative history and general interpretive rules, that the 1978 amendments to the ADEA, including the amended section 4(f)(2), were intended by Congress to operate prospectively to provide statutory protection for older workers that reflects society's more comprehensive understanding, in the year 1978, of the desires and abilities of those workers.

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bill, in response to those questions. *Id.* During the same meeting, Senator Williams, in answering Senator Randolph's inquiry, stated, in substance, that the amendment to section 4(f)(2) would not be applied retroactively. *Id.* In viewing Senator Percy's questions, Senator Javits' assurances, and Senator Williams' statement together, as they occurred during the same meeting, this Court infers from the legislative history that the retroactivity issue was specifically considered by the conference committee and that the decision to apply the amendment prospectively evolved, in part, from the conferees' emphasis on the need for precautionary measures.

Even if Congress did not clearly express an intent to apply the amended section 4(f)(2) prospectively, this Court would find that the facts and circumstances present in this case require that the 1978 amendment not be applied to the defendants' termination of 142 employees during their 1971 force reduction. The Court recognizes the general principle established in *Bradley* v. *School Board, supra*, that existing law must control a decision, but concludes that manifest injustice would result if that rule were followed in this case.

In *Bradley*, the Supreme Court stated that the court must look to three factors in determining whether current law may be justifiably applied to pre-exsting controversies. Those factors are: (1) the nature and identity of the parties; (2) the nature of their rights; and (3) the nature of the impact of the change in the law upon those rights. *Bradley, supra* at 717.

Under the first prong of the *Bradley* test, the Court must judge whether the present controversy more closely resembles a "mere private [case] between individuals," *id.* 416 U.S. at 718, 94 S.Ct. 2006, or an issue of "great national concern." *Id.* at 718-19, 94 S.Ct. 2006; *see United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110, 2 L.Ed. 103 (1801). The Court agrees with the plaintiff that age discrimination is an issue of great national concern but feels that there is an additional issue of equal importance in this case—the ability of private individuals and businesses to justifiably rely on current, reasonable interpretations of existing law in arranging their activities and relationships. This private interest is a cornerstone of a just and orderly society that should be given no less weight than the need to eradicate age discrimination in employment. In judging the nature and interests of the parties, then, it is clear that the present case contains ingredients of both public and private concern. This mixture of interests distinguishes this case

from cases such as *Bradley, supra,* and *United States* v. *Hinds County School Board,* 560 F.2d 619 (5th Cir. 1977), which involved the issue of school desegregation and little, if any, justifiable reliance on the part of the public officials named as defendants.

Under the second factor in weighing manifest injustice, the Court must determine whether the application of current law will unreasonably infringe upon a "right that had matured or become unconditional." *Bradley, supra,* 416 at 720, 94 S.Ct. at 2020; *see Greene* v. *United States, supra.* The plaintiff contends that, under traditional case law, see, e.g., *Greene* v. *United States, supra; Claridge Apartments Co.* v. *Commissioner,* 323 U.S. 141, 65 S.Ct. 172, 89 L.Ed. 139 (1944); *Union Pacific R.R.* v. *Laramie Stock Yards Co.,* 231 U.S. 190, 34 S.Ct. 101, 58 L.Ed. 179 (1913), the scope of those rights that are mature or unconditional is narrow. The plaintiff also asserts that the defendants' right to engage in age discrimination certainly would not fall within those boundaries. *See* Plaintiff's Memorandum at 12. Therefore, the plaintiff would have the Court conclude that the retroactive withdrawal of the defendants' right to engage in age discrimination pursuant to the terms of their pension plan would not work a manifest injustice.

The Court disagrees with the plaintiff's reading of the scope of those rights which are mature or unconditional and the Secretary's characterization of the defendants' right affected by the application of the 1978 amendment as solely the right to engage in age discrimination. The Court believes that the nature of the parties' rights must be treated with some flexibility, consistent with the complexities of economic life, and considered closely with the third factor in *Bradley*—the impact of the change in the law on those rights.

In *Bradley* and many of the cases that have applied laws retroactively under the *Bradley* test, *see, e.g., King*

v. *Greenblatt*, 560 F.2d 1024 (1st Cir. 1977) (Civil Rights Attorney's Fees Awards Act); *United States* v. *Hinds County School Board*, *supra* (Equal Educational Opportunity Act of 1974); *Gates* v. *Collier*, *supra* (Civil Rights Attorney's Fees Awards Act); *White* v. *Estelle*, *supra* (Federal Magistrates Act) courts have characterized defendants' rights in terms of whether they could expect that they had a right to engage in the now proscribed activity, *United States* v. *Hinds County School Board*, *supra* at 622, or whether they would have "ordered their conduct differently if they had known the new statute was going to apply" to that activity. *King* v. *Greenblatt*, *supra* at 1025-26 n.2; *see Bradley*, *supra*, 416 U.S. at 720-21, 94 S.Ct. 2006. In this case, the B & O and C & O, as private enterprises, are in a much different situation with respect to the nature of their rights affected by the change in the law than the public defendants in the above cited cases. Although they may not have had a right to engage in age discrimination, the B & O and C & O did have a right to engage in commerce and to take those actions necessary to achieve economic stability that were not violative of the law. Furthermore, the defendants relied upon and conformed with the former Wage and Hour Administrator's interpretive bulletin on the meaning of section 4(f)(2) in choosing to terminate 142 individuals pursuant to the retirement terms of their pension plan. It is obvious that the B & O and C & O would not have followed this course of action as part of a major economic reorganization if they knew or could reasonably expect that the present interpretation of section 4(f)(2) would be applied to their activity.

Therefore, this Court finds that the defendants, as private enterprises entering into a major economic decision, had a right to rely upon the Secretary of Labor's interpretation of section 4(f)(2). Moreover, the impact of the 1978 amendment upon that right would be severe

and unjustifiable. To apply the amendment, under these circumstances, would work a manifest injustice on the right of these defendants, as private entities, to go forward with a course of action which they validly believed was in conformance with the best interpretation of the law at that time. As a result, this Court alternatively holds that, even if Congress did not intend the 1978 amendment to apply prospectively, the amended section 4(f)(2) cannot be applied in this case since it would work a manifest injustice on the rights of the defendants. *See Bradley* v. *School Board, supra; Arkoosh* v. *Dean Witter & Co.*, 571 F.2d 437 (8th Cir. 1978).

In accordance with the aforegoing opinion, IT IS hereby ORDERED this 5th day of December, 1978 that:

(1) the plaintiff's Motion for Partial Reconsideration of this Court's September 6, 1978 opinion in light of the 1978 amendment to section 4(f)(2) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (1976) BE, and the same hereby IS DENIED.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

September 23, 1980

To:

Thomas J. Allen, Esq.
Donald S. Shire, Esq.
Beatrice Rosenberg, Esq.
Russell T. Baker, Esq.
Joseph B. Geyer, Esq.
Daniel Clements, Esq.
Michael P. Berman, Esq.
Thompson Powers, Esq.
Ronald S. Cooper, Esq.
Morgan D. Hodgson, Esq.

NOTICE OF JUDGMENT..

Judgment was entered in Case No. 79-1210, 79-1211 this date. The Court's opinion is enclosed.

Petition for Rehearing (FRAP 40)

Filing Time

A petition may be filed within 14 days after judgment. *No extensions will be granted save for the most compelling reasons.* Requests based on grounds such as miscalculation of time or a need to consult with orders will be peremptorily denied.

Purpose

A petition should only be made to direct the Court's attention to one or more of the following situations:

1. A material fact or law overlooked in the decision.
2. A change in the *law* which occurred after the case was submitted and which was overlooked by the panel.

3. An apparent conflict of another decision of the Court which is not addressed in the opinion.

The filing of a petition in order merely to reargue the case is an abuse of the privilege.

Statement of Counsel

A petition shall contain an introductory statement that, in counsel's judgment, one or more of the situations exists which is described in the "Purpose Section" discussed above. Thereafter, the points to be raised, succinctly stated, shall then be listed in the statement. Lacking such a statement, the petition will be returned to counsel without filing.

Form

The 15 page limit allowed by the Rule shall be observed. The Court requires 15 copies of the petition; however a pro se party who is indigent may file the original only.

Filing Time

Bill of Costs (FRAP 39)

A party to whom costs are allowed, who desire taxation of costs, shall file a bill of costs within 14 days after judgment.

Issuance Time

Mandate (FRAP 41)

The mandate is issued 21 days after judgment. A timely petition for rehearing will stay the issuance. If the petition is denied, the mandate will issue 7 days later. If a stay of mandate is sought, only the original of a motion need be filed.

WILLIAM K. SLATE, II
Clerk

Enclosure

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 79-1210

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Appellant,

versus

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.
Appellees.

EQUAL EMPLOYMENT ADVISORY COUNCIL,
Amicus Curiae.

No. 79-1211

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Appellee,

versus

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.,
Appellants.

EQUAL EMPLOYMENT ADVISORY COUNCIL, *Amicus Curiae.*

ORDER

Upon consideration of the appellees' petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Sprouse for a panel consisting of Judge Butzner, Judge Hall, and Judge Sprouse.

Filed Dec. 17, 1980

For the Court

/s/ William K. Slate, II
Clerk

APPENDIX F

(1) Section 4(a)(1) of the Age Discrimination Act of 1967 ("ADEA"), 29 U.S.C. § 623(a)(1)(1976), provides as follows:

> (a) It shall be unlawful for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) Section 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2)(1976), provided as follows prior to its amendment by § 2(a) of the Age Discrimination in Employment Act Amendment of 1978, Pub. L. 95-256, § 2(a), April 6, 1978, 92 Stat. 189:

> (f) It shall not be unlawful for an employer, employment agency, or labor organization—
>
> > (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual;

(3) Section 2(a) of the Age Discrimination in Employment Act Amendments of 1978, Pub. L. 95-256, § 2(a), April 6, 1978, 92 Stat. 189, amended § 4(f)(2) of the ADEA as follows:

> *Section 2:* (a) Section 4(f)(2) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623(f)(2)) is amended by inserting after "individual" a comma and the following: "and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual

specified by section 12(a) of this Act because of the age of such individual."

(4) Section 7(e) of the ADEA, 29 U.S.C. § 626(e) (1976), provides as follows:

> (e) Section 255 and 259 [§ 10 of the Portal-to-Portal Act, 29 U.S.C. § 259 (1976)] of this title shall apply to actions under this chapter.

(5) Section 10 of the Portal-to-Portal Act, 29 U.S.C. § 259 (1976), provides as follows:

> (a) In any action or proceeding based on any act or omission on or after May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended [29 U.S.C. 201 et seq.], the Walsh-Healey Act [41 U.S.C. 35 et seq.], or the Bacon-Davis Act [40 U.S.C. 276a et seq.], if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.
>
> (b) The agency referred to in subsection (a) of this section shall be—
>
> > (1) in the case of the Fair Labor Standards Act of 1938 [29 U.S.C. 201 et seq.], as amended—the Administrator of the Wage and Hour Division of the Department of Labor;

(2) in the case of the Walsh-Healey Act [41 U.S.C. 35 et seq.]—the Secretary of Labor, or any Federal officer utilized by him in the administration of such Act; and

(3) in the case of the Bacon-Davis Act [40 U.S.C. 276a et seq.]—the Secretary ol Labor.

(6) Rule 52(a) of the Federal Rules of Civil Procedure provides as follows:

(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

APPENDIX G

(1) The Chesapeake & Ohio Railway Company Supplemental Pension Plan, which covered the Company's non-contract employees, contained the following provisions at the time of the 1971 force reduction:

(a) ARTICLE V RETIREMENT AND RETIREMENT ALLOWANCES

* * * *

3. Age 62 Retirement Allowance At his election, a member may retire on or at any time after the day he attains age 62 and has been in the employ continuously or otherwise of the Company, or any of its predecessors or constituent companies, for a period of 10 years, in which event he shall be entitled to a retirement allowance determined in accordance with Section 2 hereof, commencing with the month following his retirement.

3A. Age 60 Retirement Allowance At his election, a member may retire between the ages of 60 and 62 if he has been in the employ continuously or otherwise of the Company or any of its predecessors or constituent companies for a period of 10 years, in which event he shall be entitled to a retirement allowance determined in accordance with Section 2 hereof, commencing with the month following his retirement; provided, however, such retirement allowance shall be reduced 1/180 for each calendar month under age 62 when the retirement allowance begins to accrue if service is less than 20 years.

4. Early Retirement Allowance (a) Any member whose service is terminated before age 60 but after he has attained age 55 and who has been in the employ continuously or otherwise of the Company or any of its predecessors or constituent companies

for a period of 10 years shall be entitled to receive an early retirement allowance deferred to the month following his 62nd birthday anniversary. Such deferred retirement allowance shall be computed as a normal retirement allowance on the basis of his average final compensation and creditable service to the date of such termination and upon the Railroad Retirement annuity as provided in Section 10 of this Article V.

(b) ARTICLE IX CERTAIN RIGHTS AND OBLIGATIONS OF THE COMPANY

* * * *

4. The establishment of the Supplemental Plan shall not be construed as conferring any legal rights upon any employee for a continuation of employment, nor shall it interfere with the rights of the Company to discharge any employee and to treat him without regard to the effect which such treatment might have upon him as a member of the Supplemental Plan.

(2) The Baltimore & Ohio Railroad Company Supplemental Pension Plan, which covered the Company's noncontract employees, contained the following provisions at the time of the 1971 force reduction.

ARTICLE III—RETIREMENT BENEFITS

Section 1.

(a). A member may retire—

(i) Upon attaining age 65, or

(ii) Upon attaining age 62 and before attaining age 65, following at least 10 years of continuous service, or

(iii) Upon attaining age 60 and before attaining age 62, following at least 10 years of continuous service, or

(iv) Upon attaining age 55 and before attaining age 60, following at least 10 years of continuous service, or

(v) Before attaining age 55 and following at least 20 years of continuous service, in which event he shall be entitled to an annuity deferred to age 60, or

(vi) At any age, when totally and permanently disabled, following at least 20 years of covered service.

(b) A member who so retires shall, upon application duly made, be entitled to an annuity payable thereafter during his life (hereinafter called a single life annuity) which, on an annual basis, shall be 1½% of the member's average final compensation multiplied by his years of creditable service as defined in paragraph (c) of this Section 1, and reduced by 70% of the Railroad Retirement annuity as provided in paragraph (d) of this Section 1; provided, however,

(1) That the single life annuity payable to a member with less than 20 years of continuous service who shall retire pursuant to the provisions of clause (iii) of paragraph (a) of this Section 1 shall be reduced by 1/180 for each calendar month by which his age at retirement shall have been less than 62 years;

(2) That the single life annuity payable to a members who shall retire pursuant to the provisions of clause (iv) of paragraph (a) of this Section 1 shall be reduced by 1/180 for each of the first 24 months and 1/240 for each calendar month in addition to 24 by which his age at retirement shall have been less than 62 years.

* * * *

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No. 80-1929

In the Supreme Court of the United States

OCTOBER TERM, 1980

THE BALTIMORE AND OHIO RAILROAD CO. AND THE CHESAPEAKE AND OHIO RAILWAY CO., PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners' involuntary retirement in 1971 and 1972 of employees between the ages of 60 and 65 violated the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*

2. Whether petitioners' 1974 amendment of their retirement plans to reduce the mandatory retirement age to 62 violated the ADEA.

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In the Supreme Court of the United States

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v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-13a) is reported at 632 F. 2d 1107. The decision of the district court (Pet. App. 14a-41a) is reported at 461 F. Supp. 362.

JURISDICTION

The judgment of the court of appeals (Pet. App. 57a) was entered on September 23, 1980. A petition for rehearing was denied on December 17, 1980 (Pet. App. 59a-60a). On March 13, 1981, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 16, 1981, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1971, in response to economic setbacks, petitioners, two railroad companies under consolidated management, decided to reduce their work force. They chose to retire involuntarily 142 employees who, by virtue of their age and length of service, were entitled to pensions under petitioners' private pension plans. These employees were selected for involuntary retirement because of their pension entitlement, and their pension eligibility was based solely on age and years of service (Pet. App. 3a). At the time of termination, the employees were either between the ages of 60 and 62 with at least 20 years of service or between the ages of 62 and 65 with at least 10 years of service. It is undisputed that the employees were performing their duties satisfactorily at the time of their involuntary retirement.

At the time of the employee terminations, the pension plan in effect for petitioner Chesapeake and Ohio Railway Company authorized compulsory retirement at the normal retirement age of 65. The pension plan in effect for petitioner Baltimore and Ohio Railroad Company did not contain a provision regarding either normal or compulsory retirement, although a company brochure referred to 65 as normal retirement age (Pet. App. 5a & nn.2, 3, 6a). Neither plan authorized involuntary retirement on the basis of age prior to age 65. Petitioners' vice-president testified that the involuntary retirement of employees prior to the age provided in the pension plans was "an inherent right of management in managing the business * * *. It has nothing to do with the plan" (*id.* at 5a). After the Department of Labor began investigating the involuntary, age-based terminations, petitioners amended their pension plans, effective January 1, 1974, to reduce the mandatory retirement age from 65 to 62 (*id.* at 10a).

In June 1974, the Department of Labor filed this employment discrimination action in the United States District Court for the District of Maryland, alleging that petitioners violated the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, by involuntarily retiring 142 employees because of their age-related entitlement to company pensions and by amending their pension plans to lower the mandatory retirement age from 65 to 62.[1] The district court found that the facts established a prima facie violation of the ADEA (Pet. App. 29a). It further ruled, however, that under Section 4(f)(2) of the Act, 29 U.S.C. 623(f)(2), as it stood prior to its amendment in 1978, petitioners' actions were not unlawful, because they were taken "to observe the terms of a * * * bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter" (Pet. App. 30a). In addition, the district court held (*id.* at 37a-40a) that petitioners had acted "in good faith in conformity with and in reliance on" written administrative interpretations of the Act and therefore were entitled to the exemption from liability provided by Section 7(e) of the Act, 29 U.S.C. 626(e), incorporating Section 10 of the Portal-to-Portal Act of 1947, 29 U.S.C. 259. The court concluded that, because petitioners had terminated the 142 employees in the observance of a bona fide pension plan, as authorized by Section 4(f)(2) of the Act, petitioners had acted in reasonable reliance on opinion letters of the Department of Labor's Wage-Hour Administrator and an ADEA Interpretative Bulletin, which stated that the statute

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[1]The Equal Employment Opportunity Commission was substituted as appellant after the briefs were filed in the court of appeals. In 1978, Congress transferred enforcement responsibilities under the ADEA from the Secretary of Labor to the Commission. See Reorg. Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978).

permitted involuntary retirement before age 65, "provided that such retirement is pursuant to the terms of a retirement or pension plan meeting the requirements of Section 4(f)(2)" (Pet. App. 38a).

The court of appeals reversed. It endorsed the district court's conclusion that prima facie violations of the Act had been established and held that petitioners' conduct did not qualify for any of the exemptions from the Act's prohibitions.

The court ruled that because neither the express nor the implied provisions of the railroad pension plans authorized involuntary retirement on the basis of age before 65, the termination of the 142 employees "could not have been to observe the terms of the plans" (Pet. App. 8a). The court explained that "[a] successful 4(f)(2) defense requires that the involuntary termination be pursuant to the pension plan's design—not to a discretionary act of management" (*id.* at 7a). The court also held that the lowering of the mandatory retirement age from 65 to 62 in 1974 in order "to effect continued forced retirements based on age" was a "subterfuge to evade the purpose[s]" of the Act and therefore was not protected by Section 4(f)(2) (Pet. App. 11a-12a).[2]

The court of appeals rejected petitioners' defense of good faith reliance on administrative interpretations of the Act. The court observed that the opinion letters and interpretive bulletin at issue authorized involuntary retirement on the

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[2]Section 4(f)(2) was amended in 1978 to eliminate the exemption for bona fide employee benefit plans that require or permit involuntary retirement on the basis of age before age 65. 29 U.S.C. (Supp. III) 623(f)(2). The EEOC argued in the court of appeals that the 1978 amendment invalidated petitioners' amended pension plans, but, because the court held that the reduction of the plans' involuntary retirement age to 62 was a subterfuge and therefore was not in any event entitled to Section 4(f)(2)'s exemption, the court did not consider the effect of the 1978 amendment.

basis of age only "if pursuant to the terms of a pension plan" (Pet. App. 9a). Because the court had already held that petitioners' pension plans did not permit involuntary retirement before age 65, it ruled that petitioners' alleged reliance on the opinion letters was unjustified (*id.* at 9a-10a). Moreover, the court said, the administrative interpretations were not sufficiently specific to cover petitioners' situation, and petitioners did not present "objective evidence that [they] relied on [the interpretive bulletin] in good faith" (*id.* at 10a). With respect to the amendment of the pension plans to lower the involuntary retirement age to 62, the court noted that, on more than one occasion before the companies' action, the Department of Labor had notified petitioners that the mandatory retirement of employees before the age of 65 violated the Act. For this reason, the court ruled (*id.* at 12a-13a), petitioners could not establish that they had relied in good faith on a 1968 opinion letter of the Wage-Hour Administrator, which, the court agreed, was "generally supportive of the railroad companies' position" (*id.* at 12a).

ARGUMENT

The court of appeals correctly held that the forced retirement of 142 persons based on their age and length of service violated the Age Discrimination in Employment Act of 1967 and could not be justified by the terms of petitioners' pension plans. The court also ruled correctly that the 1974 amendment of the pension plans to lower the involuntary retirement age to 62 was designed to evade the goals of the ADEA. In any event, the modified pension plans are clearly inconsistent with the ADEA, as amended in 1978. The court of appeals' decision, therefore, has little or no prospective significance, because the Act as it now stands flatly prohibits employee benefit plans that require or permit involuntary retirement based on age before the age of 70.The ruling below does not conflict with this Court's decision in *United Air Lines, Inc.* v. *McMann*, 434 U.S.

192 (1977), or with any of the other appellate decisions interpreting the ADEA. Further review, accordingly, is not warranted.

1. The district court and the court of appeals both correctly held that petitioners' practice of discharging employees on the basis of their age-related eligibility for retirement benefits constitutes a *per se* violation of Section 4(a)(1) of the ADEA, which prohibits the discharge or an employee "because of such individual's age." 29 U.S.C. 623(a)(1). Although petitioners argue that the terminations were based "not on the employees' age as such, but on the employees' entitlement to a pension" (Pet. 11), it is undisputed that pension eligibility "was based solely on age and years of service" (Pet. App. 3a). As the court of appeals recognized, the employees would not have been forced to retire "but for" their age. This practice is discriminatory on its face and violates the Act unless supported by a valid defense. See *Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702, 712-713 (1978). Indeed, petitioners' "age plus" argument is of a piece with, and no more persuasive than, the "sex plus" argument that was unanimously rejected in the first case argued to this Court under Title VII of the Civil Rights Act of 1964. *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971) (involving employer discrimination against only those women with pre-school-age children).

Contrary to petitioners' apparent contention, nothing in the Act authorizes an employer to select employees under the age of 65 for mandatory retirement on the basis of age, whenever the employer concludes that such a course is required for the employer's economic well-being and for the benefit of other employees.[3] While petitioners' effort to

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[3]Contrary to petitioners' arguments (Pet. 10-15), the decision below does not conflict with *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), and its progeny. The pattern of proof outlined in *McDonnell Douglas* is designed to determine whether particular employment

restrict their reduction in force to employees eligible for retirement benefits might have been a reasonable choice in the absence of the ADEA, petitioners' real complaint is that Congress deprived them of that option. But any reassessment of that policy judgment must, of course, be made by Congress, rather than by the courts or by those charged with the Act's enforcement.

2. Petitioners' repeated assertion that the termination of the 142 railroad employees was undertaken "to observe the terms of a * * * bona fide employee benefit plan," as authorized by Section 4(f)(2) of the Act, is wholly without basis in fact. The simple truth is that neither of petitioners' pension plans required or permitted involuntary retirement on the basis of age before age 65. None of petitioners' elaborate argumentation can gainsay that critical fact. The court of appeals' ruling is based on a correct, literal, and commonsense reading of the clear statutory language of Section 4(f)(2): in order for an employer to establish that it acted as it did "to observe the terms" of a retirement plan, the action taken must be one compelled or at least specifically authorized by those terms. Otherwise, the action is simply not one undertaken for the purpose of observing the terms of a pension plan. Every other court of appeals to have addressed the issue has agreed that the exemption in the original version of Section 4(f)(2) is unavailable where the retirement plan does not provide for involuntary retirement before age 65. See *Benzel* v. *Valley National Bank of Arizona*, 633 F. 2d 1325, 1327 (9th Cir. 1980); *Sexton* v. *Beatrice Foods Co.*, 630 F. 2d 478 (7th Cir. 1980). Cf.

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decisions were based on impermissible criteria in cases where there is doubt. In a case such as this, however, where the employer's policy is based expressly on age, resort to the *McDonnell Douglas* formula to establish an inference of discrimination is unnecessary; the showing has been made directly. *Ramirez* v. *Sloss*, 615 F. 2d 163, 168 (5th Cir. 1980); *Loeb* v. *Textron, Inc.*, 600 F. 2d 1003, 1017 (1st Cir. 1979).

Gonsalves v. *Caterpillar Tractor Co.*, 634 F. 2d 1065 (7th Cir. 1980), cert. denied, No. 80-1380 (Apr. 20, 1981). None of the cases cited by petitioners holds otherwise.[4]

It is undisputed that petitioners' plans did not expressly confer upon the companies any right to force retirement before age 65 (Pet. App. 6a, 31a). It is also undisputed, as the court of appeals recognized, that "all * * * previous terminations [prior to age 65] were both unrelated to the pension plans and made under company authority exclusive of the pension plans" (*id.* at 7a). As petitioners' own officer testified (*id.* at 5a), the "past terminations were based on 'an inherent right of management in managing * * * personnel. It has nothing to do with the plan.' " The court of appeals did not hold, as petitioners assert, that any element of managerial discretion under a retirement plan renders the Section 4(f)(2) exemption inapplicable; rather, the court properly concluded that Section 4(f)(2) by its terms does not protect acts of managerial discretion that "hav[e] nothing to do with the pension plans" (Pet. App. 7a).[5]

3. The court of appeals correctly ruled that petitioners' amendment of their retirement plans in 1974 to reduce the mandatory retirement age was a "subterfuge to evade the purpose[s]" of the ADEA and therefore was not entitled to a Section 4(f)(2) exemption. This holding accords with the

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[4]All of the cases on which petitioners rely (Pet. 17, 19) involved retirement plans that expressly provided for involuntary retirement at an age below 65.

[5]Accordingly, the decision below does not conflict with the cases cited by petitioners (Pet. 19) holding that retirement pursuant to express provisions in a plan authorizing early involuntary retirement at the option of the employer was within the scope of Section 4(f)(2) prior to its 1978 amendments. Nor is the court of appeals' ruling in the present case at odds with *United Air Lines, Inc.* v. *McMann, supra*, in which this Court simply construed the "normal" retirement age of 60 expressly set forth in the employer's plan as authorizing mandatory involuntary retirement at that age.

decision of this Court in *United Air Lines, Inc.* v. *McMann, supra,* and with the decisions of other courts of appeals that interpreted Section 4(f)(2) as originally enacted. In *McMann* (434 U.S. at 203), the Court held that a provision in a plan adopted prior to the enactment of the ADEA cannot be a subterfuge to evade a statute passed years later. By contrast, when, as here, a retirement plan has been amended after the effective date of the ADEA, an employer cannot show the absence of an impermissible motive merely by pointing to the chronology of events. At least two courts of appeals have directly addressed the proof required to show that a post-ADEA amendment to a retirement plan is not a subterfuge to evade the purpose of the Act. Both of these courts have held that, in order to defend an amendment of the kind at issue here, an employer must advance legitimate non-discriminatory reasons for lowering its mandatory retirement age. *Smart* v. *Porter Paint Co.*, 630 F. 2d 490, 495 (7th Cir. 1980); *EEOC* v. *Eastern Airlines, Inc.*, No. 79-3960 (5th Cir. Apr. 14, 1981), slip op. 8. Cf. Carpenter v. *Continental Trailways,* 635 F. 2d 578 (6th Cir. 1980).[6]

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[6]Although the court in *Carpenter* ultimately found no subterfuge in the adoption of the optional retirement plan at issue there, the court did say that a plan adopted or amended after the passage of the ADEA "should undergo more thorough scrutiny" (635 F. 2d at 581). See also *EEOC* v. *Home Insurance Co.*, No. 78 CIV. 6242 (S.D.N.Y. Jan. 21, 1981), appeal docketed, No. 81-6055 (2d Cir., filed Mar. 19, 1981) (holding that employer's reasons for post-Act reduction of the mandatory retirement age must be examined, but finding no subterfuge on the basis of the reasons articulated); accord, *Marshall* v. *Atlantic Container Line, G.I.E.*, 470 F. Supp. 71 (S.D.N.Y. 1979).

The only purpose ever articulated by petitioners for lowering the mandatory retirement age was the reduction of their work force. Under the amended plan, this purpose would be accomplished at the express and specific expense of the older workers employed by petitioners. But, as the federal courts have recognized, the ADEA forbids involuntary retirement on the basis of age at age 62, even if an employer can demonstrate that some reduction in its work force is economically necessary. See *McCorstin* v. *U.S. Steel Corp.*, 621 F. 2d 749 (5th Cir. 1980); *EEOC* v. *Sandia Corp.*, 639 F. 2d 600 (10th Cir. 1980).[7] The amendments to the pension plan in the present case were designed for no other purpose than to evade the prohibitions of the Act against age-based terminations before age 65. The court of appeals therefore properly ruled that the amendments were a "subterfuge" not entitled to protection under Section 4(f)(2).

4. Wholly apart from the "subterfuge" question, the 1974 amendments to petitioners' pension plans have unquestionably been invalid ever since April 6, 1978, the effective date of the 1978 amendment to Section 4(f)(2) of the Act. That amendment was intended to invalidate pension plan features of the kind sustained in *McMann*. It stated that no "seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual [between the ages of 40 and 69] because of the age of such individual" (29 U.S.C. (Supp. III) 623(f)(2)).[8] The conference report on the 1978 amendments explicitly announced

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[7]The court of appeals concluded and rejected petitioners' argument that forced retirement of older workers was required by business necessity, noting that while "economic crisis precipitated the necessity for reducing their work force[, t]hat factor provided no incentive for the layoff or retirement of this particular group" (Pet. App. 5a).

[8]The 1978 amendment to Section 12(a) of the Act, 29 U.S.C. (Supp. III) 631(a), increased the upper limit of the age group protected by the statute to 70, effective January 1, 1979.

the congressional disagreement with the result reached in *McMann* and stated that "[pension p]lan provisions in effect prior to the date of enactment are not exempt under section 4(f)(2) by virtue of the fact that they antedate the act or these amendments." H.R. Rep. No. 95-950, 95th Cong., 2d Sess. 7-8 (1978). Thus, whatever may have been the status of petitioners' 1974 modifications of their pension plans prior to the 1978 statutory changes, it is clear that petitioners may not now require retirement on the basis of age before age 70. For this reason, any possible inadequacy in the reasoning underlying the court of appeals' invalidation of the 1974 pension plan amendments lacks prospective significance and, accordingly, does not warrant review by this Court.

5. Finally, petitioners' attempt to avail themselves of the defense provided in Section 7(e) of the Act, 29 U.S.C. 626(e), incorporating Section 10 of the Portal-to-Portal Act of 1947, 29 U.S.C. 259, is without merit. Neither the involuntary retirement of 142 employees nor the change in the pension plans' mandatory retirement age was undertaken "in good faith in conformity with and in reliance on" applicable written administrative interpretations of the ADEA.

With respect to the terminations in 1971 and 1972 of employees between the ages of 60 and 65, the opinion letter and interpretive bulletin on which petitioners rely merely authorized involuntary retirement pursuant to the terms of a bona fide retirement plan. Petitioners' attempt to assert a Section 7(e) defense therefore begs the question whether the employee terminations were effected in order to observe the terms of petitioners' pension plans. For this reason, the availability of a Section 7(e) defense in connection with the dismissal of the individual employees turns entirely on the availability of a Section 4(f)(2) defense for that action. And since, as we have already explained, petitioners were not entitled to a Section 4(f)(2) defense because their pension

plans did not require or expressly authorize mandatory retirement before age 65, they were similarly not entitled to a Section 7(e) defense.

With respect to the 1974 amendments to petitioners' pension plans, the argument is slightly different, although the result is the same. It is true, as the court of appeals acknowledged (Pet. App. 12a), that a 1968 opinion letter of the Wage-Hour Administrator was "generally supportive of the railroad companies' position" (see also Pet. 5-6). But, as the court of appeals also observed, petitioners presented only the scantiest evidence of any actual reliance on this letter, and in any event, by the time the pension plan amendments were adopted, the railroad companies plainly were aware that the Department of Labor did not approve of their efforts to retire employees involuntarily on the basis of age before age 65. Petitioners knew they were being investigated by the Department of Labor for possible noncompliance with the ADEA, and they nevertheless completed the involuntary retirements even after the Department of Labor compliance officer informed them that in his view the retirements violated the Act. After being twice advised by the government that they had violated the Act, petitioners amended their pension plans to reduce the mandatory retirement age. If petitioners did not recognize that their actions were suspect, it was because they "did not look, or looking, did not see or want to see, what was so plainly there." *Clifton D. Mayhew, Inc.* v. *Wirtz*, 413 F. 2d 658, 663 (4th Cir. 1969).

In any event, the correctness of the court of appeals' ruling on petitioners' asserted Section 7(e) defense with respect to the reduction of the involuntary retirement age to 62 is a highly fact-bound matter that does not independently deserve the attention of this Court. Not only does it turn exclusively on the particular sequence of events in the

course of the Department of Labor's investigation of petitioners in the early 1970's, but, as we have previously observed, it lacks prospective importance due to the 1978 amendments to the ADEA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1929

THE BALTIMORE AND OHIO RAILROAD CO. AND THE CHESAPEAKE AND OHIO RAILWAY CO.,
Petitioners

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONERS' REPLY MEMORANDUM

Having persuaded the Court of Appeals to ignore the district court's findings of fact, the Equal Employment Opportunity Commission ("EEOC") now seeks to avoid review of the decision below on two grounds: (1) lack of "prospective significance" due to changes in the law; and (2) the decision's "fact-specific" nature. This attempt must fail for the reasons set forth below.

1. Neither ground relied on by EEOC affects the undisputed circuit conflict on whether an "objective" or "subjective" good faith standard governs the "good faith reliance" defense available under Section 7(e) of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 626(e). Both the Second and District of Columbia Circuits have rejected the "objective" good faith standard applied by the court below and the Ninth Circuit. Pet. at 23-24. Rather, they have held that the " 'good faith' of the statute requires . . . only an honest intention to ascertain what the . . . Act requires and to act in accord-

ance with it."[1] Contrary to EEOC's contention, this issue presents a pure question of law since, as the district court noted, the government *at no point* contested the petitioners' "subjective" good faith reliance upon Department of Labor interpretations of Section 4(f)(2) of the ADEA. Pet. App. B at 39a.[2] Indeed, at least with respect to the lowering of the mandatory retirement age, EEOC's opposition implicitly concedes the Companies' subjective reliance on an opinion letter "generally supportive" of their actions,[3] a hardly surprising concession in view of the district court's finding that the letter in question "sanctioned . . . exactly what [the Companies] did." Pet. App. B at 39a-40a.

Moreover, EEOC cannot dispute the "prospective importance" of the "good faith reliance" defense issue. Regardless of the future validity of involuntary retirements, questions will arise as to whether employer actions otherwise violative of the ADEA qualify for the Section 7(e) exemption. In view of the recent increase in ADEA charges, such questions, most likely, will arise with even greater frequency.[4] Moreover, the importance of this issue extends beyond the ADEA since the exemption also

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[1] Addison v. Huron Stevedoring Corp., 204 F.2d 88, 93 (2d Cir.), *cert. denied*, 346 U.S. 877 (1953). *Accord*, Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 464 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978).

[2] The Companies do not concede that their actions did not also satisfy an objective good faith standard as the district court found. Pet. App. B at 37a-40a. Indeed, since the district court adopted the same interpretation of the administrative materials as the Companies, there can be no doubt that the Companies acted in a reasonably prudent manner in relying on them.

[3] Opp. at 12.

[4] The Acting Chairman of the EEOC recently stated that charges filed under the ADEA had increased from 5400 in fiscal year 1979 to 8800 in fiscal year 1980, a rise of over sixty percent. Statement of J. Clay Smith, Jr., Acting Chairman of the EEOC, before Subcommittee on the Depts. of Commerce, Justice, State, the Judiciary and Related Agencies of the House Committee on Appropriations (March 11, 1981), at 10-11.

applies to the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.*, the Walsh-Healey Act, 41 U.S.C. §§ 35, *et seq.*, and the Davis-Bacon Act, 40 U.S.C. §§ 276a, *et seq.*,[5] while a similarly worded exemption is found in title VII, 42 U.S.C. § 2000e-12(b). This Court's intervention, therefore, is essential to insure uniformity on this important question of federal law.

2. Rather than refuting the Companies' contention that title VII standards are inapplicable, EEOC's opposition underscores the need for ADEA standards that will preclude the ADEA's application to responsible business decisions that were in no sense motivated by age animus. EEOC has always conceded that the Companies' actions were not based on age as such, but on the employees' entitlement to a pension and a continued source of income. Opp. at 6. Nonetheless, using a mechanical "but for" analysis, EEOC asserts that the Companies' actions were discriminatory *per se* because entitlement to this valuable fringe benefit was conditioned, in part, upon age. For support, EEOC relies on title VII case law striking down practices that were based on an impermissible criterion plus a nondiscriminatory factor, *i.e.*, the "sex plus" cases. Opp. at 6.[6]

EEOC's analysis, like that of the courts below, ignores one salient fact—unlike title VII, the ADEA explicitly sanctions employer action "based on reasonable factors other than age." ADEA § 4(f)(1), 29 U.S.C. § 623(f)(1). Accordingly, the fact that pension entitlement, rather than age, formed the basis for the Companies' action[7] should take the retirements outside the ADEA's scope. *City of McKeesport v. International As-*

[5] 29 U.S.C. § 259.

[6] Significantly, EEOC, like the Fourth Circuit, fails to offer any alternative to the Companies' reasoned and humane response to their economic crisis.

[7] Indeed, any sugestion that pension entitlement did not form the basis for the Companies' action would be disingenous since the parties expressly stipulated that fact prior to trial.

sociation of Firefighters, 399 A.2d 798, 799 (Pa. Commw. Ct. 1979). This conclusion is evident from this Court's recent explanation of the significance of the exclusion of the similarly worded Equal Pay Act defense from title VII:

> Title VII's prohibition of discriminatory employment practices was intended to be broadly inclusive, proscribing "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." . . . The structure of Title VII litigation, including presumptions, burdens of proof, and defenses, has been designed to reflect this approach. *The [factor other than sex] defense of the Equal Pay Act, however, was designed differently, to confine the application of the Act to wage differentials attributable to sex discrimination.*

County of Washington v. Gunther, 49 U.S.L.W. 4623, 4626 (June 8, 1981) (citations omitted) (emphasis added).[8] The Court's intervention, therefore, is needed to insure recognition of this basic distinction between the ADEA and title VII.

Finally, even if title VII standards govern, the lower court's misapplication of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny still would mandate reversal. Contrary to the EEOC's assertion, the courts below held that *prima facie*, rather than *per se*, violations of the ADEA had been established. Pet. App. at 6a, 29a. Nonetheless, neither court considered whether the nondiscriminatory motives articulated by the Companies were sufficient to rebut that *prima facie* showing. Their failure to do so, whether viewed as error

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[8] Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978), relied on by EEOC, supports this view. There, the Court did not hold that the "factor other than sex" defense was unavailable because sex was one factor considered by the employer in requiring female employees to make larger contributions to a pension fund. Rather, it based its holding on the fact that sex was the *only* factor considered. 435 U.S. at 712-713. The decision thus indicates that consideration of an impermissible criterion is not fatal to the defense so long as that criterion, as here, does not form the basis for the employer's action.

under ADEA § 4(f)(1) or under *McDonnel Douglas*, not only rendered irrelevant the Companies' nondiscriminatory motivation, but also imposed upon them a burden of rebuttal far in excess of that permitted under *Texas Department of Community Affairs v. Burdine*, 49 U.S.L.W. 4214 (March 4, 1981).[9]

3. EEOC's suggestion that the 1978 amendments to the ADEA have deprived the Section 4(f)(2) issues of prospective significance is both incorrect and disingenuous. Those amendments have no impact on the various issues raised concerning the proper interpretation of the language of Section 4(f)(2). Rather than altering the exemption's language, the amendments simply added a clause to Section 4(f)(2) making it inapplicable to involuntary age-based retirements. Thus, the interpretation questions raised will be recurring, albeit outside the retirement context.

Nor can the continued significance of those issues to pre-1978 retirements be lightly disregarded. As EEOC is well aware, there still remain numerous pending and potential lawsuits involving the legality of pre-1978 retirements, one of which is also pending before this Court on a petition for certiorari.[10] The potential liability faced by employers is massive. Not surprisingly then, as late as July 28, 1981, EEOC itself viewed this area of sufficient significance to promulgate an interpretation of Section 4(f)(2) which addresses the applicability of the

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[9] That EEOC supports such analysis is hardly surprising in light of its interpretation of Section 4(f)(1), issued on July 28, 1981. That interpretation would require an employer to prove affirmatively, rather than simply articulate, a reasonable factor other than age for his actions. 29 C.F.R. § 1625.7(e), *as reported in* 353 BNA Pension Reporter (Aug. 3, 1981) (unpublished, to be codified), at R-26.

[10] That case, EEOC v. Eastern Airlines, Inc., No. 79-3960 (5th Cir., Apr. 14, 1981), *petition for cert. filed*, 50 U.S.L.W. 3013 (July 28, 1981), involves a Section 4(f)(2) issue virtually identical to that here presented concerning the proper interpretation of the term "subterfuge" in the post-ADEA context. Pet. at 22-24.

1978 amendments to pre-1978 retirements. Despite having lost the issue in all five Courts of Appeals that have considered it,[11] EEOC adhered to the position that the 1978 amendments invalidated retirements effected prior to the amendments' enactment. 29 C.F.R. § 1625.9(b)(1), *as reported in* 353 BNA Pension Reporter (Aug. 3, 1981) (unpublished, to be codified), at R-27. Accordingly, EEOC's own recent actions belie its suggestion that this is an area without "prospective importance." Moreover, those actions, like the complete disregard of the official ADEA interpretations on which the Companies relied, evidence the administrative lawlessness that employers have been subjected to in this area.

That EEOC would attempt to avoid resolution of the Section 4(f)(2) issues underscores its inability to counter the Companies' contentions on the merits. EEOC's entire "observe the terms" argument is that the terms of the plans did not authorize involuntary early retirement. That argument, based on a single sentence of testimony seized out of context, is wholly specious. It ignores not only the district court's finding to the contrary,[12] but also the parties' stipulation that the retirements were made on the basis of pension entitlement. To suggest now that the retirements were made on the basis of entitlement to a pension, but were not authorized by the plans, is absurd. Indeed, not a single retiree has has ever questioned the Companies' authority, apart from the ADEA, to require their early retirement.

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[11] EEOC v. Shell Oil Co., 637 F.2d 683 (9th Cir. 1981); Sikora v. American Can Company, 622 F.2d 1116 (3rd Cir. 1980); Jensen v. Gulf Oil Refining & Marketing Co., 623 F.2d 406 (5th Cir. 1980); Carpenter v. Continental Trailways, 635 F.2d 578 (6th Cir. 1980); Smart v. Porter Paint Co., 630 F.2d 490 (7th Cir. 1980).

[12] Pet. App. at 32a-33a, 37a. Rather than a single sentence of testimony, the district court's finding that the plans authorized involuntary early retirement was based on the terms of the plans themselves construed against extensive evidence of the plans' historical operation.

Even apart from this fact, EEOC's argument wholly misses the point. As the Companies demonstrated, to the extent the Fourth Circuit found irrelevant the historical practice relied on by the district court in construing the plans' terms, the decision below is in direct conflict with *United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977), *Aldendifer v. Continental Air Lines, Inc.*, 25 Empl. Prac. Dec. ¶ 31,535 (9th Cir. 1981), and *EEOC v. Shell Oil Co.*, 637 F.2d 683 (9th Cir. 1981). Those decisions interpreted plan language at least as ambiguous as that in the Companies' plans to authorize involuntary age-based retirement on the basis of the plans' historical operation. See, Pet. at 15-16. On the other hand, to the extent the Fourth Circuit refused to credit the district court's factual finding that the Companies "always had the power to involuntarily retire their employees under a consistent application of their plans," [13] its holding runs afoul of Rule 52(a), Fed. R. Civ. Proc. Pet. at 25-26. Finally, to the extent the Fourth Circuit's holding was based on the view that Section 4(f)(2) was unavailable due to the discretionary nature of the retirements, its holding conflicts with the five other circuits that have considered the issue. Pet. at 19. EEOC's argument simply fails to address any of these contentions.

In any event, EEOC's suggestion that plan authorization was lacking is wholly irrelevant. As the Companies demonstrated on the basis of Section 4(f)(2)'s legislative history, no such authorization is required. Pet. at 17-18. Rather, since an employer's right to separate an employee is never derived from a pension plan, the "observe the terms" requirement, properly construed, requires simply that an employer honor an employee's pension rights and pay the benefits provided by the plan. *Id.* This the Companies plainly did.

The "subterfuge" arguments advanced by EEOC to avoid review are even less convincing. As a threshold matter, it is important to recognize that a circuit con-

[13] Pet. App. at 37a.

flict, unaddressed by EEOC, exists on the question of whether a plan paying substantial benefits can ever constitute a "subterfuge." *Compare Zinger v. Blanchette*, 549 F.2d 901 (3rd Cir. 1977), *cert. denied*, 434 U.S. 1008 (1978), *and Marshall v. Hawaiian Tel. Co.*, 575 F.2d 763 (9th Cir. 1978), *with* decision below. That standard, which Justice White recognized as the proper test in his concurring opinion in *McMann*,[14] obviously mandates reversal of the Fourth Circuit's ruling.

Moreover, even among those circuits that have rejected the "substantial benefit" standard, there is a significant conflict on the type of proof an employer must advance to demonstrate that a post-ADEA plan is not an impermissible "subterfuge." As the Companies' petition notes, the Sixth Circuit in *Carpenter v. Continental Tailways*, 635 F.2d 578 (6th Cir. 1980), held that an employer need show only that his plan constituted a "legitimate instrument" established to provide benefits for his employees. That decision clearly conflicts with the decision below. Furthermore, it conflicts with both decisions relied on by EEOC—*EEOC v. Eastern Air Lines, Inc., supra*, and *Smart v. Porter Paint Co., supra*. Those decisions do little more than resurrect in the post-ADEA retirement plan context,[15] the business justification requirement rejected by this Court for pre-Act plans in *McMann*.[16] That requirement, of course, renders Sections

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[14] United Air Lines, Inc. v. McMann, 434 U.S. at 207 (White, J., concurring).

[15] The Companies do not concede that their plans are post-ADEA plans for purposes of Section 4(f)(2). In finding that the plans did not constitute a "subterfuge," the district court treated them as pre-ADEA plans despite the post-ADEA reduction in the retirement age since: (1) they predated the ADEA and paid substantial benefits; (2) the benefit levels of the plans had been improved in connection with the age reduction; and (3) the age reduction was merely a codification of the Companies' historic power to retire its employers involuntarily. Pet. App. at 36a-37a.

[16] In any event, neither Smart v. Porter Paint Co., *supra*, nor EEOC v. Eastern Air Lines, Inc., *supra*, support the decision below. In indicating that an employer could avoid a subterfuge

4(f)(1) and 4(f)(2) redundant since an employer has no need to rely on Section 4(f)(2) if his action is based on a reasonable factor other than age. Accordingly, this Court should grant certiorari not only to remove the confusion in this area, but also to insure a meaningful interpretation of each provision of the statute.[17]

4. EEOC's repeated suggestion that the instant case is too fact-specific to warrant review is wholly without merit. Whatever validity that suggestion might have in another context, it can have none where, as here, a Court of Appeals' actions have made a mockery of the "clearly erroneous" standard. As demonstrated in the Companies' petition, the Fourth Circuit disregarded, without finding "clearly erroneous," key factual determinations made by the district court on the actual operation of the pension plans, the Companies' motives in engaging in the challenged actions, and the Companies'

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finding on the basis of legitimate business reasons, they necessarily rejected the Fourth Circuit's view that any post-ADEA action inconsistent with the ADEA's goals necessarily constituted a "subterfuge." Pet. at 19-20. Moreover, while both cases arose outside the context of an economically necessary force reduction, and thus, are distinguishable factually, *Smart* did discuss the instant case and suggest that the "extensive evidence of a business purpose [advanced] for lowering the normal retirement age" was sufficient to avoid a "subterfuge" finding. Smart v. Porter Paint Co., 630 F.2d at 496, n.4.

[17] The decisions relied on by the EEOC to support the position that an employer cannot reduce his workforce by terminating older employees—McCorstin v. U.S. Steel Corp., 621 F.2d 749 (5th Cir. 1980) and EEOC v. Sandia Corp., 639 F.2d 600 (10th Cir. 1980)—are inapposite. In neither case was the question of whether the employer's actions were exempt under Section 4(f)(2) before the court. While *McCorstin* did suggest in dicta that Section 4(f)(2) was unavailable, it did not do so on the ground that such use of a pension plan constituted an impermissible "subterfuge." Rather, its suggestion was based on the view, now discredited in the Fifth Circuit and elsewhere, that retirements effected at an employer's option were not exempt under Section 4(f)(2). See, e.g., Jensen v. Gulf Oil Refining & Marketing Co., 623 F.2d 406 (9th Cir. 1980). Thus, both decisions hold simply that a dicharge effected on the basis of age violates the ADEA in the absence of an exemption.

good faith reliance upon official administrative interpretations of the ADEA. Pet. at 24-26. To now refuse review because of the factual complexity injected into this case by the disregard of such findings would not only reward the Fourth Circuit for its non-compliance with Rule 52(a), Fed. R. Civ. Proc., but also permit appellate courts to shield review of any controversial decision by simply substituting their own factual judgments for those of the district court.

CONCLUSION

For the reasons stated herein as well as those stated in the Companies' petition for a writ of certiorari, this Court should grant the petition.

Respectfully submitted,

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